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I. INTRODUCTION

The 1980-81 term of the Seventh Circuit does not give civil rights litigants much cause for encouragement. This can be attributed, at least in part, to the small number of cases presenting significant, con-

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troversial issues of importance in the area of civil rights litigation. It is also attributable to the general unwillingness of the court to resist some of the oppressive signals from the Supreme Court. During a period such as this when the Supreme Court is not particularly friendly toward civil rights matters, the hope is that the appellate courts will take some of the sting out of its adverse decisions by a strict, limiting construction. Unfortunately, it generally appears that the Seventh Circuit is getting the message all too well.

There were, however, a few bright spots. In the first amendment area, the court refused to abandon traditional first amendment doctrine in dealing with the controversial issue of regulating adult entertainment. It also took a strict approach to an employer's obligation under federal law to accommodate the religious needs of employees. On the abortion question, the court refused to retreat from the strict scrutiny analysis formulated in early Supreme Court decisions and it struck several provisions of an Illinois law which severely limited a woman's freedom of choice. With an exception or two, the decisions regarding attorney's fees under civil rights statutes were generally favorable toward plaintiffs. The procedural due process cases certainly do not reflect any retreat from the fairly well-established analysis required by the Supreme Court.

Obviously, not all of the decisions can be discussed in a survey of this type. However, an effort was made to at least refer to all cases, even if only by way of footnotes. The organization represents an attempt to discuss the cases under topics most likely to arise in the context of civil rights litigation. For this reason, several of the cases are discussed at various places. When relevant, decisions of the Supreme Court and other federal appellate courts are mentioned to facilitate additional research and provide a basis for comparing the Seventh Circuit with other circuits.

II. First Amendment: Freedom of Expression

A. Zoning and Licensing of Adult Entertainment

The Seventh Circuit decided two interesting and somewhat conflicting first amendment cases involving the particularly troublesome and controversial problem of regulating adult entertainment. The United States Supreme Court in the case of *Young v. American Mini Theatres, Inc.*[1] set the stage for the conflict by upholding Detroit's

1. 427 U.S. 50 (1976).

"anti-skidrow" ordinance, a zoning provision which restricted the location of new theaters showing sexually explicit "adult" movies. The decision was critical due to the justifications articulated in the plurality opinion of Justice Stevens. Until the *Young* decision the Supreme Court had followed a well-established principle that government may not control speech because of its content.[2] A core first amendment precept dictates that government may not decide what ideas are worthy of discussion nor may it discriminate among ideas.[3] The Detroit provision in *Young* was clearly aimed at one particular type of information—sexually explicit expression. Nonetheless, the plurality upheld the ordinance, arguing that the provision was "viewpoint neutral" and that it did not reflect government approval or disapproval of any particular message.[4] Even more controversial was Justice Stevens' statement that "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."[5] That statement, concurred in by four Justices, implies that sexually explicit expression has less value than other forms of protected speech.

2. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (striking an ordinance prohibiting the showing of nudity in drive-in theaters visible from the street). *See also* Carey v. Brown, 447 U.S. 455 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

3. Police Dep't of Chicago v. Mosley, 408 U.S. at 95-96. *See* Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 727 n.2 (1980), for a list of Supreme Court decisions supporting the content neutrality doctrine.

4. 427 U.S. at 70. The same concept of viewpoint neutrality is stressed in Greer v. Spock, 424 U.S. 828, 838-39 (1976), and Broadrick v. Oklahoma, 413 U.S. 601 (1973). Several commentators have rejected this distinction. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 672 (1978) [hereinafter cited as TRIBE]; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975); Stone, *Restrictions on Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 86 (1978). *Cf.* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 283-96 (1981) (finds justifications for recognizing different levels of protection based on the category of speech involved). Obviously, the critical problem is that "facially neutral" subject matter restrictions may be used to disguise government's attempt to control a particular viewpoint.

Recent Supreme Court decisions have challenged the correctness of this concept. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2898 (1981) (Justice White in a plurality opinion reiterated his objection to the concept that restrictions on free speech are permissible "so long as government does not favor one side over another on a subject of public controversy"); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."). The division on the court regarding this issue is clearly reflected in the dissenting opinion in *Metromedia*. *See* 101 S. Ct. at 2909 (Stevens, J., dissenting).

5. 427 U.S. at 70. It should be stressed that the opinion reflected only a plurality of the Court. Justice Powell, writing separately, specifically declined to adopt this "less protected" concept. Instead he relied on the four-part test in United States v. O'Brien, 391 U.S. 367 (1968), *see* note 19 *infra*, to uphold the provision as a valid zoning provision, utilizing "scatter" or "dispersal" zoning to prevent the deterioration of surrounding areas. 427 U.S. at 79-80 (Powell, J., concurring).

The question raised by the *Young* decision was whether the Supreme Court was going to start on a track of assessing the social value of different kinds of expression.[6] It was also unclear as to what impact the decision would have on some of the well-established principles surrounding the first amendment. For example, how would the Court deal with the recurring problems of vagueness, overbreadth and unbridled discretion in the censor posed by the regulation of sexually explicit materials? Perhaps the most immediate impact of the opinion was the growth in zoning-type provisions modeled after the Detroit ordinance. In *Genusa v. City of Peoria*,[7] for example, the Seventh Circuit upheld a zoning provision which was aimed at adult book stores. The zoning aspect, the court held, was indistinguishable from that in the *Young* case as far as the city's valid interest in preventing the congregation of adult entertainment with its attendant urban blight.[8] The Seventh Circuit, however, did strike two other aspects of the ordinance. The court held that a prelicensing requirement and a ban on convicted persons procuring a license constituted invalid prior restraints.[9] The city could not single out adult bookstores for special regulation unless the regulation was narrowly devised to further a substantial and legitimate state interest unrelated to the suppression of protected expression.[10] Since the regulations had nothing to do with the "scatter" zoning purpose of the ordinance and no other justification was given to sustain their validity, they both were held to be invalid restrictions on the first amendment.[11]

This term the Seventh Circuit decided two cases involving the regulation of adult entertainment.[12] In the case of *Entertainment Concepts, Inc. III v. Maciejewski*,[13] the Seventh Circuit reviewed two Village of Westmont ordinances aimed at controlling adult movie theaters. The

6. *See* TRIBE, *supra* note 4, at 674; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 200, 205 (1976).

7. 619 F.2d 1203 (7th Cir. 1980).

8. Other courts have reached the same conclusion, upholding zoning provisions clearly aimed at the location of adult entertainment. Stansberry v. Holmes, 613 F.2d 1285 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980) (upholding a county ordinance restricting the location of sexually oriented commercial enterprises); Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (upholding a North Carolina provision prohibiting a second establishment in a building where one was already located). *But see* Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978) (striking 2500-foot restriction on location of adult entertainment near churches, schools, etc. as amounting to a flat ban).

9. 619 F.2d at 1219.

10. *Id.*

11. *Id.*

12. Chulchian v. City of Indianapolis, 633 F.2d 27 (7th Cir. 1980); Entertainment Concepts, Inc. III v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

13. 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

first ordinance zoned adult movie theaters as "special use," thus requiring special prior authorization from the Village Board of Trustees before the theater could operate. The second ordinance, referred to as a "license revocation" ordinance, permitted a license to be temporarily or permanently suspended upon a finding by a citizens' movie review committee that a film was obscene. The movie review committee, together with the mayor, had the power to revoke the licenses of those who violated a prohibition against showing obscene films. Despite the fact that the city was seeking to regulate adult entertainment via a "zoning ordinance," the Seventh Circuit recognized the true nature of the provision and applied traditional first amendment doctrine to strike both ordinances.

The zoning ordinance was found to be unconstitutionally vague in that it failed to define the term "adult."[14] The court, following the standards enunciated in *Grayned v. City of Rockford*,[15] held that the ordinance (1) failed to give persons of ordinary intelligence a reasonable opportunity to know what was prohibited; (2) permitted arbitrary and discriminatory enforcement because of its vagueness; and (3) operated to inhibit the expression of free speech.[16] In addition, the Seventh Circuit held that the ordinance was an impermissible classification of speech based on content and a prior restraint on protected communication.[17] While recognizing that the Supreme Court in the *Young* decision had upheld a content-based regulation, the Seventh Circuit distinguished *Young* by noting that no valid state interest was asserted by the Village to justify its restriction.[18] Relying upon the four-part *O'Brien* test used by Justice Powell in his concurrence in *Young*,[19] the Seventh Circuit held that this ordinance—unlike that in the *Young* case—amounted to the suppression of speech, not mere regulation "[s]ince its aim . . . sweeps beyond unprotected obscenity."[20] The provision was not devised to further substantial and legitimate state inter-

14. 631 F.2d at 503.
15. 408 U.S. 104, 108-09 (1972).
16. 631 F.2d at 501.
17. *Id.* at 503.
18. *Id.* at 503-04.
19. 427 U.S. at 79-80 (Powell, J., concurring). The four-part test requires that (1) the government has authority to act; (2) the regulation furthers a substantial governmental interest; (3) such interest is unrelated to the suppression of speech; and (4) the restriction on alleged first amendment freedom is no greater than is essential to further that interest. United States v. O'Brien, 391 U.S. 367, 377 (1968). One federal court has noted that the lack of a clearly articulated standard in Justice Stevens' plurality opinion has led lower federal courts to follow Justice Powell's analysis. *See* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1226 (N.D. Ga. 1981). *See also* Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821, 825 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).
20. 631 F.2d at 504.

ests unrelated to censorship; rather, Westmont officials were given unbridled discretion to grant or deny special use permits. Thus, the court concluded that the ordinance satisfied none of the requirements for constitutional regulation of "adult" materials under *Young* and its earlier *Genusa* decision.

As to the license revocation provision, the court correctly found that it failed to provide sufficient procedural protection of speech.[21] The court relied on the standards established by the Supreme Court in *Freedman v. Maryland*,[22] requiring that (1) the burden of instituting judicial proceedings rest on the censor; (2) any restraint prior to judicial review be imposed only to preserve the status quo; and (3) prompt final judicial determination be assured.[23] The Westmont provision failed to meet any of the *Freedman* requirements. Obscenity could be determined by a citizens' movie review board together with the mayor, and there was no provision for judicial participation prior to the institution of penalties.[24] Finally, the court noted that the ordinance was in violation of the Supreme Court's recent decision in *Vance v. Universal Amusement Co.*,[25] which invalidated a Texas statute that permitted the closing of theaters adjudged to be maintaining a nuisance. The Court in *Vance* affirmed the appellate court's holding that future conduct which might fall within the purview of the first amendment could not be prohibited based on a finding of unprotected present conduct.[26]

Although the court's reliance on the *O'Brien* test was perhaps unnecessary, the Seventh Circuit did correctly limit the *Young* decision, and it applied existing doctrine regarding content neutrality, vagueness and prior restraint in striking down a repressive provision.

Two weeks after the *Maciejewski* decision, the same panel decided *Chulchian v. City of Indianapolis*,[27] a case involving application of a general business licensing ordinance to an adult movie theater. Charles Chulchian was denied a license to operate his adult movie theater in Indianapolis based on his violation of a city ordinance which imposed a duty on licensees not to permit any sort of illegal, immoral or obscene

21. *Id.* at 505.
22. 380 U.S. 51 (1965).
23. *Id.* at 58-59.
24. 631 F.2d at 505. *See also* Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir. 1980) (invalidating a Washington "moral nuisance" statute in part for violating *Freedman* standards); Wendling v. City of Duluth, 495 F. Supp. 1380 (D. Minn. 1980); Ellwest Stereo Theatres, Inc. of Texas v. Byrd, 472 F. Supp. 702 (N.D. Tex. 1979).
25. 445 U.S. 308 (1980).
26. Universal Amusement Co. v. Vance, 587 F.2d 159, 165 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980).
27. 633 F.2d 27 (7th Cir. 1980).

conduct or practices to take place on their premises. Chulchian had apparently been subjected to some ten arrests on the premises for illegal, immoral or obscene conduct. The district court held that the terms "immoral" and "obscene" were unconstitutionally vague.[28] However, the lower court did find that the city could constitutionally deny a license on the basis of illegal conduct on the premises other than prior convictions for showing obscene films.[29]

On appeal, the Seventh Circuit upheld the district court's conclusion that the "illegal conduct" part of the ordinance was valid.[30] The provision was not unconstitutionally vague because the city had provided a narrowing construction to the statute.[31] In upholding the district court's conclusion that the city could prohibit the issuance of a license to an individual who had permitted illegal conduct on the premises, the court stated, "Businesses which deal in material protected by the First Amendment . . . are not immune from all regulation. They can be subject to the usual panoply of health, safety, licensing, and zoning regulations as all other businesses."[32] The court again applied the standard of *O'Brien*[33] and concluded that the government regulation was justified despite its incidental impact on speech.[34] The court found that the regulation was not based on content, but rather was an ordinance which generally held operators of businesses responsible for the conduct on their premises.[35] Thus the ordinance promoted

28. Evansville Book Mart, Inc. v. City of Indianapolis, 477 F. Supp. 128, 133 (S.D. Ind. 1979), *aff'd sub nom.* Chulchian v. City of Indianapolis, 633 F.2d 27 (7th Cir. 1980).

29. 477 F. Supp. at 133.

30. 633 F.2d at 31. The Seventh Circuit clarified that the denial of licenses based on prior obscenity convictions would violate the Supreme Court's decision in *Vance*. *Id.* at 32.

31. *Id.* at 31.

32. *Id.* On the issue of license denial or revocation based on criminal conduct, *compare* Borrago v. City of Louisville, 456 F. Supp. 30 (W.D. Ky. 1978) (upholding an ordinance which permitted revocation of a license where the owner, any employee, partner, director or shareholder of a place of adult entertainment had committed a felony or crime of moral turpitude), *with* Cornflower Entertainment, Inc. v. Salt Lake City Corp., 485 F. Supp. 777 (D. Utah 1980) (license revocation of an adult theater based on past obscenity convictions constitutes invalid prior restraint), *and* Bayside Enterprises, Inc. v. Carson, 470 F. Supp. 1140 (M.D. Fla. 1979) (license denial or revocation based on a prior specified criminal act is an invalid prior restraint), *and* Natco Theatres, Inc. v. Ratner, 463 F. Supp. 1129 (S.D.N.Y. 1979) (an ordinance allowing denial of a license to owners and operators convicted of a number of enumerated crimes violates the first amendment). In the latter, the district court held that any system of prior restraint based upon past convictions could be sustained only if "granting a license to an individual with such a record would present a clear and present danger of a serious substantive evil." *Id.* at 1131. The court justified its conclusion in part by reference to several state supreme court decisions which invalidated similar systems of restraint. *See id.* at 1129. Under such a strict standard, the Indianapolis ordinance in *Chulchian* would probably fail.

33. *See* note 19 *supra*.

34. 633 F.2d at 31.

35. *Id.* at 31-32.

the city's dual goal of encouraging business responsibility and protecting patrons who frequent the premises.[36] The court concluded that the ordinance furthered a legitimate substantial government interest unrelated to the suppression of free speech and therefore was valid under an *O'Brien* analysis.[37]

Although at first blush the decisions reached in *Chulchian* and *Maciejewski* appear somewhat conflicting, the Seventh Circuit was probably correct in reaching its conclusions in both. The ordinances were similar in that they imposed prior restraints on first amendment rights, thus triggering strict review.[38] In *Chulchian*, the ordinance granted discretion to the controller and license review board to consider the quantity and quality of "illegal conduct," while in *Maciejewski*, the Village Board of Trustees determined what business establishments were "adult" and thus in need of special use permits. The same panel of judges upheld the former ordinance against a vagueness attack while striking the latter. The court in *Chulchian* focused on the narrowing construction the city had made, *i.e.*, that the city could not deny a license based on conduct beyond the licensee's control and that the licensee must have actual knowledge of the illegal conduct before he would be subject to the ordinance.[39] The court concluded that since persons are deemed to have knowledge of the law, the ordinance was not vague as to licensees.[40] As far as first amendment implications, the court characterized the ordinance as having merely "an incidental impact on speech."[41] This was a general business licensing provision holding operators responsible for conduct on the premises, not an attempt to regulate adult theaters based on content. The purpose of the provision was simply to encourage business responsibility and to protect patrons from illegal conduct.[42]

In contrast, the facts in *Maciejewski* indicate that the special zoning ordinance was amended by city officials to include adult movie theaters in order to control the plaintiff, who operated the only theater in

36. *Id.* at 32.
37. *Id.*
38. A line of Supreme Court cases holds that regulations which impose prior restraints upon free speech guarantees must provide narrow objective standards to guide the licensing authority. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969). *But see* Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 455 (1980) (discussing the erosion of the doctrine against prior restraints by the Burger Court).
39. 633 F.2d at 31-32.
40. *Id.* at 31.
41. *Id.*
42. *Id.* at 32.

the Village of Westmont. The term "adult" in the ordinance was left totally undefined, leaving persons uncertain as to whether they were even subject to the special use provision and providing no standard for those administering the ordinance.[43] More importantly, the Village could not point to any state interest other than the suppression of speech. The stated aim of the Village was "to regulate the showing of sexually explicit movies,"[44] not simply to regulate location to prevent urban blight, as in *Young*.[45] While assessing the purpose or motive of a provision is often an unsure and difficult task, the court could clearly ascertain the broad impact of the Village ordinance on first amendment rights. The impact was much greater than that imposed by the zoning provision in *Young*, which merely controlled the location and which left ample sites for adult theaters to accommodate all patrons as well as distributors and exhibitors of adult films. The market for sexually explicit material was said to be "essentially unrestrained."[46]

The correctness of the Seventh Circuit decisions on speech regulation is buttressed by two recent Supreme Court opinions.[47] In *Heffron v. International Society for Krishna Consciousness*,[48] the Court noted that the state has a right to impose time, place and manner restrictions on first amendment rights provided " 'that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open alternative channels for communication of the information.' "[49] In *Heffron*, the Court upheld a rule requiring organizations desiring to distribute, sell and solicit donations at a state fair to conduct activities only at assigned locations within the fairgrounds. The Court focused on the following points: (1) the rule applied evenhandedly to all who wished to distribute and sell materials, *i.e.*, there was no evidence of any kind

43. 631 F.2d at 501. Although the defendants urged the Seventh Circuit to adopt a narrow construction and thus save the ordinance, the court said this could not be accomplished "without wholesale rewriting of the statute." *Id.* at 502. *See also* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1221 (N.D. Ga. 1981), relying in part on *Maciejewski* to strike an adult zoning provision as unconstitutionally overbroad.

44. 631 F.2d at 504.

45. 427 U.S. at 71.

46. *Id.* at 62. The Court emphasized that the situation would be different if the effect of the ordinance was to greatly restrict access to lawful speech. *Id.* at 71 n.35. Justice Powell's concurrence stressed the same point. *Id.* at 78-79 (Powell, J., concurring). *See also* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1223-24 (N.D. Ga. 1981) (striking an ordinance which would reduce access to sexually oriented entertainment).

47. Heffron v. International Soc'y for Krishna Consciousness, 101 S. Ct. 2559 (1981); Schad v. Borough of Mount Ephraim, 101 S. Ct. 2176 (1981).

48. 101 S. Ct. 2559 (1981).

49. *Id.* at 2564 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976)).

of arbitrary application of the provisions; (2) the state had a strong interest in controlling crowds at a fair—part of a well-recognized and accepted state need to protect the safety and convenience of persons using public forums; (3) it was quite improbable that any alternative means could accomplish the same state interest in light of the large number of distributors and solicitors who would be entitled to the same rights sought by the Krishna group; and (4) the provision left open alternative forums for the expression of the plaintiff's protected speech at booths on the fairgrounds and anywhere outside the fairgrounds.[50]

Thus, while the Court upheld the alleged interference with first amendment rights, it did so only after subjecting the provision to close scrutiny. In its other major first amendment decision, *Schad v. Borough of Mount Ephraim*,[51] the Court made clear that the *Young* decision would not support the view that traditional first amendment doctrine may be abandoned based on the Court's assessment of the societal worth of a particular class of expression. The Court struck down the use of the Borough's code to prohibit all live entertainment. While noting the government's power to zone and control land use, the Court held that zoning provisions which infringe on protected liberty interests must be narrowly drawn and must further sufficiently substantial government interests.[52] The *Young* decision was distinguished on two major points. First, in *Young*, the restriction on the location of adult movie theaters imposed a minimal burden on protected speech, whereas in *Schad*, the municipality sought to ban all live entertainment. Referring to *Young*, the Supreme Court noted that the decision "did not imply that a municipality could ban all adult theaters—much less all live entertainment or all nude dancing—from its commercial districts city-wide."[53] Second, *Young* was distinguished in that the evidence clearly established that the concentration of adult movie theaters in limited areas leads to deterioration of surrounding neighborhoods;[54] thus a significant state interest was established. Mount Ephraim, on the

50. 101 S. Ct. at 2564-67.

51. 101 S. Ct. 2176 (1981).

52. *Id.* at 2182-83.

53. *Id.* at 2184. Compare this conclusion with New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981), where the Court, in a per curiam decision, upheld a New York Alcoholic Beverage Control Law flatly prohibiting topless dancing in establishments licensed by the state to sell liquor for on-premises consumption. The Court construed the twenty-first amendment as a broad source of power permitting states to make this "policy decision." *Id.* at 715. *Cf. also* Olitsky v. O'Malley, 597 F.2d 295 (1st Cir. 1979) (upholding "anti-mingling" regulation of the Boston Licensing Board); Brubeck v. Florida, No. 80-229 (Fla. Cir. Ct.), *cert. denied*, 384 So. 2d 1378 (Fla. Dist. Ct. App. 1980), *appeal dismissed*, 101 S. Ct. 3133 (1981) (upholding constitutionality of a county ban on nudity in bars).

54. 427 U.S. at 71 n.34.

other hand, had not adequately justified its substantial restriction on protected activities. The alleged city interests were in no way associated merely with live entertainment; the ordinance was not narrowly drawn to respond to the distinctive problems that might be said to arise from certain types of live entertainment; nor was there any showing that restrictions less intrusive on protected forms of expression could not be drafted.[55] Finally, the Court noted that to be reasonable any restrictions must leave open adequate alternative channels of communication and "the Borough totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the First Amendment."[56]

By applying *Heffron*'s four-prong analysis to the Seventh Circuit decisions in *Chulchian* and *Maciejewski*, the opposing results reached in the cases appear justified. *Chulchian* involved a content-neutral provision aimed at all business establishments seeking to control and to encourage business responsibility and to protect patrons of business establishments. Thus, important government interests were asserted which were unrelated to content and the facts indicated that alternative forums of communication were left open. *Maciejewski*, on the other hand, involved an ordinance which was clearly content-based and which served no significant government interest other than the control of the particular content of the expression. It left open no alternative forums of communication (in that this theater was the only one in the municipality[57]) and the provision was described as overbroad and overinclusive.[58] The court thus displayed the appropriate sensitivity to the first amendment issues at stake and struck the Village's attempt to rely on *Young* to suppress expression.

B. Regulation of Government Employee and Student Expression

In addition to the zoning and licensing cases, the Seventh Circuit dealt with the first amendment rights of government employees and students. Both groups have been recognized as enjoying a somewhat qualified right to free expression. The question of how to balance the interests of these special groups against the government's interest in efficiency and harmony faced the court in some difficult fact situations.

First, in the case of *Wren v. Jones*,[59] twenty-six employees of the

55. 101 S. Ct. at 2186.
56. *Id.*
57. 631 F.2d at 498.
58. *See id.* at 501 n.2.
59. 635 F.2d 1277 (7th Cir. 1980), *cert. denied*, 102 S. Ct. 129 (1981).

State of Illinois alleged that they were discharged for political reasons in violation of the Supreme Court's decision in *Elrod v. Burns*.[60] The state argued that the terminations were not based on the employees' political beliefs at all, but rather were due to fiscal problems that had been aggravated by an Illinois circuit court decision mandating the reinstatement of previous employees who had been fired without cause contrary to Illinois law.[61] Recognizing that this was not the typical political patronage dismissal case, the Seventh Circuit noted that other courts of appeals had taken opposing approaches to first amendment issues involving government employees by relying on different Supreme Court precedents. In *Pickering v. Board of Education*,[62] the Court held that in determining whether government employees' speech is constitutionally protected, there must be "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[63] Taking a somewhat different approach, the Supreme Court, in *Mt. Healthy City School District Board of Education v. Doyle*,[64] held that, before balancing any interests, the plaintiff must initially establish that his protected conduct was in fact a "motivating factor" in a termination decision.[65] The Court's recent opinion in *Givhan v. Western Line Consolidated School District*[66] reaffirmed that an employee must first show that his constitutionally protected conduct played a " 'substantial' role in the employer's decision not to rehire him," and, further, that the employer must be given the opportunity "to show by a preponderance of the evidence that it would have reached the same decision as to the employee's reemployment even in the absence of the protected conduct."[67]

The pure balancing approach espoused in *Pickering* was recently

60. 427 U.S. 347 (1976). *Elrod* was recently reaffirmed by the Court's decision in Branti v. Finkel, 445 U.S. 507 (1980).

61. 635 F.2d at 1285.

62. 391 U.S. 563 (1968).

63. *Id.* at 568.

64. 429 U.S. 274 (1977).

65. *Id.* at 287.

66. 439 U.S. 410 (1979).

67. *Id.* at 416. This standard was heavily criticized by Professor Thomas I. Emerson as placing too heavy a burden on one deprived of first amendment rights. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 470 (1980). For a more recent discussion of the relative burdens, see Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981) (plaintiff has burden of proving that the protected conduct was a substantial or a motivating factor in the action taken against him before the burden shifts to the defendant to prove the termination would have occurred even absent the protected activity).

used by the Second Circuit in an employee dismissal case.[68] The First Circuit, however, in a case similar to *Wren*, relied on *Mt. Healthy* and *Givhan* in requiring that defendants be given the opportunity to prove that terminations were necessitated by financial circumstances and not due to political affiliation.[69]

In *Wren*, the Seventh Circuit began by acknowledging that if political association was the *sole* basis for the dismissal, a strict scrutiny analysis would have to be applied under the Supreme Court decisions in *Branti*[70] and *Elrod*.[71] Since this was not the case, the court turned to *Mt. Healthy*, but it misconstrued the standard by asking whether political affiliation was *the* motivating factor.[72] *Mt. Healthy* requires the plaintiff to establish only that protected expression was *a* motivating factor. Nonetheless, the court held that, even assuming the plaintiffs had satisfied the first part of the *Mt. Healthy* test, the defendants had established by a preponderance of the evidence that fiscal restraints required a reduction in the work force and justified the dismissals.[73] The court did go on to apply, in the alternative, a *Pickering* balancing test and concluded that the state's interest in fiscal integrity outweighed the minimal intrusion on the plaintiffs' first amendment rights.[74] The court's apparent preference for *Mt. Healthy* over *Pickering* was justified in this case, because the defendant's primary allegation was that it was not motivated by a desire to suppress first amendment rights. Although generally the question of motivation should not be a stumbling block for plaintiffs who have truly been injured because of the exercise of first amendment rights, *Wren* presented an especially appropriate case for the application of *Mt. Healthy*. The *Wren* plaintiffs were Republicans chosen from a larger group consisting solely of Republicans, and there was no evidence that the plaintiffs had engaged in any political speech or association (other than being registered Republicans) which had

68. Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 25 (2d Cir. 1979). The district court, relying on *Mt. Healthy*, determined that various communications plaintiff had engaged in were simply part of a "pattern of conduct" which fell outside first amendment protection. The Second Circuit rejected the district court's reliance on *Mt. Healthy*, finding that plaintiff's conduct was generally protected by the first amendment, and thus his allegations required a *Pickering* balancing approach. *Id.* at 28.

69. Rosaly v. Ignacio, 593 F.2d 145, 148-49 (1st Cir. 1979). *See also* Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (applying *Mt. Healthy* in a public employee dismissal case).

70. Branti v. Finkel, 445 U.S. 507 (1980).

71. 635 F.2d at 1286.

72. *Id.*

73. *Id.*

74. *Id.*

given rise to the terminations.[75] The question of whether first amendment rights were implicated at all was clearly before the court and justified its application of *Mt. Healthy*.

The contrast between the *Pickering* approach and the *Mt. Healthy* approach to first amendment issues is further illustrated by the Seventh Circuit decision in *Yoggerst v. Stewart*.[76] In *Yoggerst*, the question of illegal motivation was not at issue. The defendants clearly acted to punish the plaintiff for the words she uttered, and the only question was whether they could justify their conduct. The plaintiff, an employee of the Illinois Governor's Office of Manpower and Human Development, was reprimanded by her supervisors for having made a comment to a fellow worker derogatory of the director of the organization. She had simply called and asked a fellow employee whether he had heard any "good news," referring to an unconfirmed report that the director of the group had been fired. In response to this single telephone conversation, the plaintiff was orally warned that her conduct was unprofessional and a written memorandum was placed in her personnel file. The district court granted summary judgment based on its finding that the defendants had not infringed on any of the plaintiff's constitutional rights.[77]

The Seventh Circuit held that the district court erred in granting summary judgment, finding that the verbal reprimand followed by the written memorandum placed in the personnel file may have constituted a violation of the plaintiff's first amendment rights.[78] Following an earlier Seventh Circuit decision, the court stated that the test of unconstitutional retaliation was "whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech."[79] The court proceeded to apply the *Pickering* balancing test[80] to determine whether a public employee's speech is protected under the first amendment. The Seventh Circuit articulated the factors that would be important in a *Pickering* analysis, *i.e.*, whether the individual speech would somehow interfere with the maintenance of discipline or harmony among coworkers and whether the employment relationship required personal loyalty and confidence to function properly.[81] It

75. *Id.*
76. 623 F.2d 35 (7th Cir. 1980).
77. *Id.* at 36.
78. *Id.* at 39.
79. *Id.* (quoting McGill v. Board of Educ., 602 F.2d 774, 780 (7th Cir. 1979)).
80. *See* text accompanying notes 62-63 *supra*.
81. 623 F.2d at 40. There has been some recent controversy over the so-called "*Pickering* defenses." The Fifth Circuit recently rejected a defendant's attempt to justify its action based on

found no evidence that the plaintiff's casual comment could have in any way disrupted the harmony or discipline of the office; such a comment simply did not rise "to the level of threat to the departmental order or harmony."[82]

In another interesting case in which the court relied heavily on its analogy to the government employee situation, the Seventh Circuit upheld the right of the Army Reserve Officer's Training Corps[83] to exclude the plaintiff based on his political and social beliefs. In *Blameuser v. Andrews*,[84] the ROTC conceded that it had denied the plaintiff's application based on his Nazi sympathies and his views on white supremacy. The Seventh Circuit has clearly upheld the right of Nazis to exercise first amendment freedoms,[85] but the court distinguished this case in that it involved the government withholding a benefit rather than attempting to suppress the plaintiff's ideas or punishing him for expressing them.[86] Although the right-benefit distinction is a dangerous one to make, the court went on to explain its position by analogizing this situation to the employment relationship: "[W]hen the benefit at issue is in the form of the establishment or continuation of an employment relationship, substantial Government interests may justify burdens on political speech and association which otherwise could not withstand the exacting scrutiny given to governmental conduct affecting fundamental rights."[87] Even in cases such as *Elrod*, which denounced political patronage systems as unconstitutional, the Supreme Court left open the question of whether a hiring authority could demonstrate in a particular situation that party affiliation was an appropriate requirement for the effective performance of the public office involved.[88] Since an enrollee in the ROTC program aspires to commission as an officer in the armed services and is rewarded by a monthly stipend, the court determined that "certain burdens on First Amend-

the necessity of maintaining discipline in its police department. Williams v. Board of Regents of the Univ. Sys. of Ga., 629 F.2d 993 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 3063 (1981). Justice Rehnquist dissented from the denial of certiorari, believing the court of appeals to have struck the wrong balance. *Id.* at 3063 (Rehnquist, J., dissenting). *See also* Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977), holding that public criticism of the district attorney by his first assistant precluded any future working relationship between the parties and hence was unprotected.

82. 623 F.2d at 41.

83. Hereinafter referred to as ROTC.

84. 630 F.2d 538 (7th Cir. 1980).

85. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

86. 630 F.2d at 542.

87. *Id. See also* Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981) (noting the state's special interest in regulating the speech of its employees).

88. 630 F.2d at 542 n.4.

ment interests may be tolerated which otherwise would be impermissible."[89]

In addition to involving the employment situation, this case also involved the military, where past decisions have noted the special need for duty and discipline.[90] The court held that "[t]he interest of our government in recruiting qualified candidates to be officers in the armed services is a compelling one which may justify some inquiry into and consideration of an applicant's political beliefs . . . ."[91] It determined that the defendant was justified in finding that this particular plaintiff's beliefs disqualified him from enrollment in the ROTC advanced course. Without articulating a precise standard of review, the court concluded that the defendant's decision was justified in light of the plaintiff's statements about his unwillingness to serve in the event of military conflict in the Middle East or Africa. In addition, his views on race relations drew into question his ability to obey commands, especially if such commands came from a military superior whom he regarded as socially inferior.[92] Blameuser's answers to various questions negated the possibility of his effective leadership in the military and therefore justified the infringement on his first amendment rights. The court concluded that his beliefs were "demonstrably incompatible with the important public office he seeks and inimical to the vital mission of the agency he would serve."[93]

Although the court followed traditional first amendment doctrine in requiring the government to come up with a compelling interest to condone inquiry into the plaintiff's beliefs, it would have been helpful for the Seventh Circuit to articulate what standard of review would be sufficient to justify denial of a position based on those beliefs. The court apparently concluded that disqualification of the plaintiff would further the government's compelling interest in insuring the recruitment of qualified officers, but there was no discussion as to whether such denial was necessary to insure the government's interest. Nor was there any discussion of less restrictive means. Rather, the Seventh Circuit simply stated, "Whatever the appropriate standard of review, we hold that the defendants' decision was fully justified."[94]

89. *Id.* at 542.

90. *See, e.g.*, Brown v. Glines, 444 U.S. 348, 354-55 (1980); Department of the Air Force v. Rose, 425 U.S. 352, 367-68 (1976); Greer v. Spock, 424 U.S. 828, 837-38 (1976); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Parker v. Levy, 417 U.S. 733, 743 (1974).

91. 630 F.2d at 543.

92. *Id.*

93. *Id.* at 544.

94. *Id.* at 543.

In addition to recognizing the government's special interests in the area of employment and military security, the Seventh Circuit also gave deference to the interests of school boards vis-à-vis students. In *Zykan v. Warsaw Community School Corp.*,[95] the student plaintiffs alleged violation of their first amendment rights due to (1) the removal of various books from certain courses and from the school library based simply on the personal social, political and moral tastes of the defendant school board, (2) the elimination of seven courses from the high school curriculum, and (3) the decision not to rehire certain teachers. The students argued that these actions violated their academic freedom and their "right to know."[96]

A few courts of appeals and district courts have found that students' first amendment rights are violated by the "erratic, . . . free-wheeling manner in which the school board removes books."[97] The Seventh Circuit, in *Zykan*, however, adopted the lower court's finding that the plaintiffs' complaint failed to state a violation of constitutional rights.[98] Although it did vacate the lower court decision with leave to amend based on the novelty and importance of the issues,[99] the thrust of the Seventh Circuit decision was that students' first amendment rights are bounded by the level of their intelligence and development, and that their need for educational guidance predominates over their asserted rights.[100] The court held that it was entirely permissible for school officials to make decisions based on their own social or moral views and that their discretion must be broad.[101] Since such discretion was not used to impose a "pall of orthodoxy" on the offerings in the classroom, nothing in the Constitution permitted judicial intervention.[102] The court concluded that the facts did not allege "flagrant abuse of discretion," and that school authorities could not be accused of substituting rigid exclusive indoctrination in their decisionmaking

95. 631 F.2d 1300 (7th Cir. 1980).

96. *Id.* at 1303.

97. Pico v. Board of Educ., 638 F.2d 404, 416 (2d Cir. 1980). *See also* Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979).

98. 631 F.2d at 1304.

99. *Id.* at 1308-09.

100. *Id.* at 1305.

101. *Id.* The court listed numerous federal court decisions similarly acknowledging the need for broad discretionary powers in local school boards. *Id. See also* Williams v. Spencer, 622 F.2d 1200 (4th Cir. 1980), in which the Fourth Circuit stated that "the constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations 'reasonably designed to adjust these rights to the needs of the school environment.' " *Id.* at 1205 (quoting Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971)).

102. 631 F.2d at 1306.

processes.[103] In short, the allegations were simply too ephemeral to rise to a constitutional level.

Judge Swygert saw the facts differently. While he concurred in the majority's decision to remand,[104] he felt that the nature of the books excised (all dealing with feminism) indicated that the board was censoring a certain subject matter and therefore could be held liable for its actions.[105] Although the Seventh Circuit did remand the decision, the burden of proof it imposed on the students is practically impossible to satisfy. The court in *Zykan* expressed reluctance, as it did in the later case of *Doe v. Renfrow*,[106] to interfere with the exercise of discretion on the part of local educational authorities. It did, however, guide the plaintiffs as to the type of allegations they should make in amending their complaint. The fatal defect was apparently the absence of "any hint that the decisions of these administrators flow from some rigid and uniform view of the sort the Constitution makes unacceptable as a basis for educational decision-making or from some systematic effort to ex-

103. *Id.*

104. *Id.* at 1309 (Swygert, J., concurring in part).

105. *Id.*

106. 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 3015 (1981). *Doe v. Renfrow* involved a civil rights action brought by a junior high school student against school and police officials arising out of an investigation on school premises conducted with drug-detecting dogs. The plaintiff was required to empty her pockets after a dog alerted to her during a general classroom inspection; when the dog still alerted, she was subjected to a nude search. The district court, 475 F. Supp. 1012 (N.D. Ind. 1979), relying heavily on the school officials' *in loco parentis* relationship with the students, held that (1) the mass detention of students in their classrooms during the course of the investigation did not deny the students of their fourth amendment rights; (2) the use of dogs in the classroom to sniff for drugs was not, standing alone, a search under the fourth amendment; (3) the pocket search, although a search, was not so unreasonable as to violate the plaintiff's fourth amendment right to be free from unreasonable search and seizure; and (4) the nude search did violate the plaintiff's fourth amendment right against unreasonable searches and seizures. Notwithstanding its finding that the nude search was unreasonable, the court found the school officials immune from liability because they acted "in good faith and not in ignorance or disregard of settled indisputable principles of law." *Id.* at 1027 (citing Wood v. Strickland, 420 U.S. 308 (1975)).

The Seventh Circuit affirmed the judgment except with respect to the school officials' immunity from liability for the nude search. 631 F.2d 91 (7th Cir. 1980). The court found the officials to have acted outside the bounds of reason, stating, "It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency." *Id.* at 92-93. The judges on the original panel subsequently denied the plaintiff's petition for rehearing and a majority of active members of the court denied a rehearing en banc. 635 F.2d 582 (7th Cir. 1980). Four judges—Chief Judge Fairchild and Judges Swygert, Wood and Cudahy—dissented from the order denying the rehearings, sharing concern particularly over the Seventh Circuit's acquiescence in the district court's finding that the inspection of students by drug-detecting dogs did not constitute a search. The Supreme Court denied the plaintiff's petition for a writ of certiorari. 101 S. Ct. 3015 (1981). Justice Brennan dissented from the denial of certiorari, *id.* at 3016, noting that "[t]his Court has long expressed its abhorrence of unfocused, generalized, information-seeking searches." *Id.* at 3018.

clude a particular type of thought."[107] The court also left open the possibility of a valid cause of action if plaintiffs could show that they had been forbidden to have or read certain materials or if materials had been made "wholly unavailable to them from other sources."[108] Aside from these extremes, however, the court refused to recognize that first amendment rights had been violated.

III. First Amendment: The Religion Clauses

Two very significant decisions in the area of religion were handed down by the Seventh Circuit this past term. One involved the federal statutory prohibition on religious discrimination in employment and the other focused on the question of government aid to parochial education.

A. The Statutory Prohibition: Its Meaning and Its Constitutionality

In *Nottelson v. Smith Steel Workers*,[109] the Seventh Circuit tackled the difficult question of interpreting the section of Title VII of the Civil Rights Act which bars discrimination based on religion.[110] A 1972 amendment to the Act added section 701(j) defining religion to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[111] This definition has given rise to a tremendous amount of controversy among the appellate courts. The controversy has centered primarily on two issues. First, how much accommodation is reasonable and what constitutes undue hardship? Second, at what point does government-required accommodation violate the establishment clause of the Constitution? The Supreme Court thus far has neither determined the constitutionality of section 701(j) nor clearly defined the meaning of the provision.

The seminal decision in the area is *Trans World Airlines, Inc. v. Hardison*.[112] There the Court avoided the constitutional issue by broadly interpreting the section 701(j) defense of "undue hardship" to

107. 631 F.2d at 1306.
108. *Id.*
109. 643 F.2d 445 (7th Cir.), *cert. denied*, 102 S. Ct. 587 (1981).
110. 42 U.S.C. § 2000e-2(a)(1) (1976) provides that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . religion."
111. 42 U.S.C. § 2000e(j) (1976).
112. 432 U.S. 63 (1977).

exist whenever the cost imposed on the employer was more than de minimis.[113] In *Hardison*, the plaintiff's religious beliefs barred him from working the Saturday shift. The Supreme Court held that TWA had made reasonable accommodation by discussing the issues with Hardison, attempting to work out a solution and making special arrangements for religious holidays, and that to require further measures would cause TWA undue hardship.[114] TWA could not force other employees to take Hardison's shift because that would have been inconsistent with a valid collective bargaining agreement[115] or would have involved cost to TWA in the form of lost efficiency in other jobs or higher wages.[116] This narrow interpretation of section 701(j) has been characterized as having rendered the reasonable accommodation requirement "all but defunct."[117] The courts of appeals decisions after *Hardison* appear to indicate that very little must be done by an employer to establish a de minimis burden.[118] In fact, the burden of proof appears to shift to the plaintiff to show that the employer did not make even the most minimal showing of accommodation.

In *Nottelson*, the Seventh Circuit made clear that it would join those federal courts that have given section 701(j) a more liberal construction.[119] *Nottelson* involved a Seventh-Day Adventist whose reli-

113. *Id.* at 84. The dissent deemed the $150 expense that would have been incurred over three months for overtime pay to be de minimis. *Id.* at 92 n.6 (Marshall, J., dissenting). The majority rejected that finding, articulating concern over the number of employees who, like Hardison, might seek similar accommodation at similar expense. *Id.* at 84 n.15.

114. *Id.* at 77.

115. *Id.* at 79.

116. *Id.* at 84. The Fifth Circuit relied on this aspect of *Hardison* to find undue hardship where a plaintiff's absence from work for religious purposes required his replacement with two supervisors, causing inefficiency in the warehouse operation as well as distraction from the supervisors' performance of their normal duties. The court noted that the lack of direct monetary cost to the employer was not controlling. Howard v. Haverty Furniture, 615 F.2d 203, 206 (5th Cir. 1980).

117. Retter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 COLUM. HUM. RTS. L. REV. 63, 86 (1979). Retter read post-*Hardison* decisions as permitting employers to refuse to accommodate either by citing the hypothetical cost that would result if similar accommodation was provided others or by referring to the mild objections of coworkers. *Id.* at 83.

118. *See, e.g.*, Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441 (8th Cir. 1979) (employer would bear more than de minimis cost accommodating plaintiff's desire not to work on his Sabbath); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977) (plaintiff's demand for a written guarantee that she not be required to work on Saturday was unreasonable and constituted undue hardship to employer). *See also* Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); Rohr v. Western Elec. Co., 567 F.2d 829 (8th Cir. 1977).

119. 643 F.2d at 451. *See, e.g.*, Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979) (reversing district court conclusion that permitting a Sabbatarian to leave the workforce before sunset on Friday was more than de minimis where the company could not prove it incurred extra costs and projected future effects were purely theoretical in light of the company's actual experience); Haring v. Blumenthal, 471 F. Supp. 1172, 1181-82 (D.D.C. 1979) (holding that undue hardship must mean present undue hardship as distinguished from anticipated or "multiplied"

gion taught that it was morally wrong to be a member of or pay dues to a labor organization. Nottelson requested his union to accommodate his religious objection by permitting him to pay a sum equivalent to the dues to a nonreligious, nonunion charity. The union refused and instead put pressure on Smith, Nottelson's employer, to fire him. The union's key defense was that the enforcement of its union security clause, which required membership in the union as a condition of continued employment with Smith, was protected under the National Labor Relations Act[120] and therefore did not violate Title VII.[121] It also argued that section 701(j), as sought to be applied, violated the establishment clause of the first amendment. The Seventh Circuit joined three other courts of appeals[122] in holding that the union's security clause and its sanction under the NLRA did not override the Title VII prohibition of religious discrimination.[123] Lack of an express exemption in Title VII, coupled with the absence of any evidence that Congress intended the courts to imply such an exemption from the NLRA, convinced the Seventh Circuit that a union security provision does not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of its employees.[124]

hardship; otherwise any slight hardship "magnified through prediction of future behavior of the employee's co-workers" would immunize employers from liability).

120. Hereinafter referred to as the NLRA.

121. Sections 8(a)(3) and 8(b)(2) of the NLRA, 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1976), recognize the validity of union security clauses and the concomitant right of a union to demand discharge of an employee for failure to pay dues. Note, however, that a subsequent amendment to the NLRA requires employers to recognize conscientious objections to joining unions and to permit the charity substitute sought here. *See* Act of December 24, 1980, Pub. L. No. 96-593, 94 Stat. 3452, which replaced § 19 of the NLRA. The new § 19 provides in pertinent part:

> Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employees' employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee.

122. Yott v. North American Rockwell Corp., 602 F.2d 904, 909 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980); McDaniel v. Essex Int'l, Inc., 571 F.2d 338, 343 (6th Cir. 1978); Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163, 170 (5th Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). Note that a few recent decisions have gone further and specifically held, as the Seventh Circuit does here, 643 F.2d at 452, that the substituted charity accommodation would not cause the union undue hardship. *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981); McDaniel v. Essex Int'l, Inc., 509 F. Supp. 1055 (W.D. Mich. 1981).

123. 643 F.2d at 451.

124. *Id.*

The Seventh Circuit went on to find that the charity substitute accommodation Hardison sought would impose only a de minimis cost on the union and would not increase the amount or severity of duties required of coworkers. In upholding this conclusion, the Seventh Circuit pointed to the following facts: (1) the secretary-treasurer of the union testified that the union would not be financially injured by the loss of the plaintiff's dues, which represented only .02% of the union's annual budget; (2) there was no evidence that the loss of receipts from the plaintiff would necessitate an increase in the dues of his coworkers, and that if such an increase were necessary it would amount only to 2.4 cents per year per employee;[125] and (3) there was no evidence presented that other workers would seek similar accommodations or that the accommodation would lead to a labor strike. Indeed, the charity substitute had already been officially adopted by the Executive Council of the AFL-CIO as an appropriate accommodation of individual religious needs.[126] The court concluded that the district court's findings were thus amply supported by the record.

An even more important part of the decision concerned the question of burden of proof. The Seventh Circuit made clear that the burden of making a reasonable accommodation or proving undue hardship lies with the defendant, in this case the union, and that at trial the union failed to present any evidence to satisfy its burden.[127] The court also deemed the employer's reliance upon the collective bargaining agreement to be insufficient.[128] Although arguably Smith could have faced costs from undergoing a grievance proceeding for not abiding by the terms of the collective bargaining agreement, the court reasoned that Smith could have lessened its exposure and protected the plaintiff by complying with Title VII and not acceding to the union's demands.[129]

Finally, on the issue of the constitutionality of section 701(j), the court held that the provision did not violate the first amendment's command that Congress shall make no law respecting an establishment of religion.[130] The court relied in part on the decision of *Rankins v. Com-*

125. The court noted that in Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 407 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), it was held that even an increase of 24 cents per year was de minimis. 643 F.2d at 452.

126. 643 F.2d at 452.

127. *Id.* The Ninth Circuit similarly placed the burden on the union to show reasonable accommodation. Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243 (9th Cir. 1981).

128. 643 F.2d at 452.

129. *Id.* at 453.

130. U.S. CONST. amend. I.

mission on Professional Competence[131] in which the California Supreme Court adopted the language of section 701(j) to interpret its state constitutional provision outlawing religious discrimination in employment and upheld the constitutionality of such a provision.[132] The Seventh Circuit proceeded to evaluate and uphold section 701(j) under the three-part test enunciated by the Supreme Court in *Lemon v. Kurtzman*[133] for determining whether a statute is permissible under the establishment clause. The *Nottelson* court concluded that the purpose of Title VII's antidiscrimination provision was to achieve equality of employment opportunity; that the primary effect was not the advancement of religion, but only the promotion of "the principle of supremacy of conscience"; and that section 701(j) did not foster an excessive government entanglement with religion.[134] The court likened the provision to the conscientious objector exemptions under the selective service statutes which were sanctioned by the Supreme Court.[135] Thus, the Seventh Circuit joined the majority of federal courts which have upheld the constitutionality of the provision.[136]

Of key significance is the Seventh Circuit decision to impose on the employer the burden of showing some concrete evidence that more than a de minimis cost would result if an employee's religious beliefs were accommodated. A few appellate court decisions have in essence permitted an employer to refuse accommodation either by citing hypothetical costs that would result if similar accommodation were provided

131. 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *appeal dismissed*, 444 U.S. 986 (1979).

132. The United States Supreme Court dismissed the appeal for want of a substantial federal question, 444 U.S. 986 (1979), which arguably is a decision on the merits. *See* Hicks v. Miranda, 422 U.S. 332, 343-44 (1975).

133. 403 U.S. 602 (1971). The test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citation omitted).

134. 643 F.2d at 454.

135. *Id.*

136. *See* Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981); Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (8th Cir. 1975), *rev'd*, 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976); Burns v. Southern Pac. Transp. Co., 20 Empl. Prac. Dec. ¶ 30,184, at 11,977-78 (D. Ariz. 1979), *on remand from* 589 F.2d 403 (9th Cir. 1978); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975). *Contra*, Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782 (S.D. Cal. 1980); Yott v. North American Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds*, 602 F.2d 904 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980). *See also* Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. DAYTON L. REV. 59 (1980); Note, *The Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices*, 56 CHI.-KENT L. REV. 635 (1980) (finding that § 701(j) fails the secular effects test); Retter, *The Rise and Fall of Title VII's Requirement of Reasonable Accommodation for Religious Employees*, 11 COLUM. HUM. RTS. L. REV. 63, 84 n.127 (1979) (discussing several cases on the constitutional issue).

other workers or by referring to mild objections of the complainant's coworkers.[137] The Seventh Circuit has chosen to leave the burden of proof where it was prior to *Hardison, i.e.*, on the employer who is obviously in a better position to provide information as to the economic costs of accommodation and to require evidence that is more than merely conjectural.[138] This position is buttressed by the recent EEOC guidelines[139] on religious discrimination which require an employer to demonstrate that undue hardship would in fact result from each available method of accommodation and which reject mere assumptions that others will be seeking accommodation as insufficient evidence of undue hardship. Thus, at least for now, section 701(j) has retained its intended vigor in the Seventh Circuit.

B. Government Aid to Parochial Education

The second important decision regarding religion handed down by the Seventh Circuit involved the controversial question of government aid to parochial education.[140] In the case of *Decker v. O'Donnell*,[141] suit was brought by three federal taxpayers from Wisconsin seeking a nationwide injunction prohibiting the payment of certain federal funds for public service employment positions under Title II, Part D of the recently amended Comprehensive Employment Training Act of 1973.[142] The plaintiffs argued that payment of such funds to elementary and secondary schools operated by religious or sectarian organizations violated the establishment clause of the first amendment.[143] As originally drafted, the only restriction on the placement of CETA employees in sectarian schools read as follows: "Participants shall not be employed on the construction, operation, or maintenance of so much of

137. *See* cases cited note 118 *supra*.

138. The Ninth Circuit in Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981), recently adopted the Seventh Circuit's position, holding that "[a] claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships; instead, it must be supported by proof of 'actual imposition on co-workers or disruption of the work routine.'" *Id.* at 1243 (quoting Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 406-07 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979)). *See also* cases cited note 119 *supra*. This was the position reflected in pre-*Hardison* decisions. *See, e.g.*, Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1976).

139. 29 C.F.R. § 1605.1 (1981).

140. The Supreme Court continues to tackle this issue almost every term. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

141. 661 F.2d 598 (7th Cir. 1980).

142. 29 U.S.C. §§ 801-999 (1976 & Supp. III 1979). Hereinafter referred to as CETA.

143. U.S. CONST. amend. I.

any facility as is used or to be used for sectarian instruction or as a place for religious worship."[144] Subsequent regulations[145] drafted by the Department of Labor, which took effect on September 17, 1979, were also challenged by the plaintiffs as not correcting the constitutional infirmity of the CETA provisions. Under the Act, CETA funds were allocated by the Department of Labor among various prime sponsors who in turn would either hire CETA participants themselves or subgrant the moneys to other governmental entities or eligible nonprofit organizations which then provided employment to CETA participants. The fact-finding centered primarily on Milwaukee County as a prime sponsor and the Archdiocese of Milwaukee as a subgrantee. The latter received some $329,000 in federal money in the fiscal year 1978 and approximately $143,000 in the fiscal year 1979.[146]

The Seventh Circuit applied the three-prong test used by the Supreme Court in determining the validity of state aid to religion: the legislative enactment must have a secular purpose; its primary effect must neither advance nor inhibit religion; and it must not foster an excessive government entanglement with religion.[147] As to the third prong of the test, excessive entanglement consists of both "the excessive administrative surveillance of religious institutions by government sometimes needed to ensure public funds are not used for religious purposes, . . . and the potential for political division along religious lines with respect to governmental aid programs."[148] Of key relevance to the effect and administrative entanglement analysis in this case were the following facts: (1) the institutions involved were all pervasively sectarian elementary and secondary schools; (2) the CETA workers were subject to daily supervision of the schools and thus could be considered employees of the sectarian schools and not government employees; and (3) the CETA program did not require that public schools receive levels of CETA worker assistance comparable to those enjoyed by the sectarian schools.[149]

The Seventh Circuit proceeded to discuss and invalidate the various positions permitted by the Department of Labor's regulation. Outstationing CETA workers in sectarian schools for the purpose of providing remedial education services violated the entanglement prong

144. 29 U.S.C. § 823(a)(2) (Supp. III 1979) (formerly 29 U.S.C. § 848(h)).
145. 20 C.F.R. § 676.71 (1981).
146. 661 F.2d at 603.
147. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980).
148. 661 F.2d at 606 (citations omitted).
149. *Id.* at 607-09.

and therefore was unconstitutional.[150] Although the regulations placed various restrictions upon remedial education teachers, the court nonetheless held that enforcement would be too entangling to pass constitutional muster.[151] Placement of CETA workers in instructional positions in summer or recreation programs or in adult education programs was held to be invalid.[152] As to the latter, the court reasoned that even though the Supreme Court has stressed the relative susceptibility of young students to indoctrination, this factor was not decisive in its decisions to invalidate government aid.[153] Since it was not insured that adult education courses here would match the nondoctrinaire intellectual atmosphere of colleges, where aid has been approved, and since the instructors were substantially under the control of sectarian schools, the court felt the adult education program was invalid.[154]

The same conclusion was reached with regard to CETA workers doing custodial child care after school hours where a pervasively sectarian school setting would exist[155] and with regard to CETA workers in diagnostic or therapeutic speech and hearing services.[156] Although the Supreme Court has upheld the permissibility of having diagnosticians who are public employees visit parochial schools,[157] the court distinguished the situation of "circuit-riding" diagnosticians working for the state with diagnosticians who in fact were employees of the sectarian school and funded under CETA.[158] The court proceeded to invalidate other CETA positions, including, for example, providing services related to the health and safety of the students, performing functions with regard to the administration and grading of state-prepared examinations and providing support services for the administration of federally funded or regulated programs.[159]

150. *Id.* at 610.

151. *Id. But see* National Coalition for Pub. Educ. v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980), upholding, against a claim of excessive entanglement, the use of funds appropriated under the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701-3386 (Supp. III 1979), for remedial education of parochial students by public school teachers on the premises of parochial schools. The court determined that the evidence with regard to the character of the schools as well as the operation of the program established that the Title I program did not create excessive administrative entanglement nor result in divisive political fragmentation. 489 F. Supp. at 1265-70.

152. 661 F.2d at 610-11.

153. *See* Tilton v. Richardson, 403 U.S. 672, 685-88 (1971).

154. 661 F.2d at 611.

155. *Id.* at 612.

156. *Id.*

157. Wolman v. Walter, 433 U.S. 229 (1977).

158. 661 F.2d at 612.

159. As to test administration, the Supreme Court in *Regan* held that state reimbursement of nonpublic schools' cost of administering and grading certain state-mandated and prepared tests

Perhaps the most controversial aspect of the *Decker* decision was the court's conclusion that even though the placement of CETA workers in various positions related to the health and food services to students would pass muster under both the effect and the administrative entanglement tests, they still had to be struck as violating the political divisiveness concept.[160] The general conclusion was that "all placement of CETA workers in sectarian schools is prohibited under the Constitution because the structure of decisionmaking about funding creates an impermissible risk of political entanglement for the CETA program as a whole."[161] Although the concept of political entanglement was enunciated by the Supreme Court as an important factor in determining a violation of the establishment clause,[162] it has never invalidated a program *solely* on political entanglement grounds. In fact, the Supreme Court, in *Committee for Public Education v. Nyquist*,[163] warned in dicta that "the prospect of [seriously divisive political consequences] may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court . . . ."[164] The Seventh Circuit nonetheless justified its conclusion by pointing to language in various decisions in which the Supreme Court noted that political entanglement was one of the principal evils against which the first amendment was intended to protect and that it constituted a "warning signal" of "an inevitable progression leading to the establishment of state churches and state religion."[165]

The potential for political divisiveness created by CETA's statutory funding mechanism does appear to be especially strong. The Sev-

was constitutional. 444 U.S. at 652. The Seventh Circuit distinguished *Regan* on two points: in *Regan* the tests were all state-imposed requirements and the grading function gave the schools no control over the results due to the nature of the exams. In *Decker*, no such assurances could be made. 661 F.2d at 613.

160. *Id.* at 615-16.

161. *Id.* at 615.

162. *See* note 147 *supra* and accompanying text.

163. 413 U.S. 756 (1973).

164. *Id.* at 797-98.

165. 661 F.2d at 616 n.34. *See also* TRIBE, *supra* note 4, at 868. Tribe stresses the significance of political divisiveness as a warning signal: "[T]he very symbolism of conspicuous governmental aid to identifiably religious enterprise is regarded as an independent evil." *Id.* Other recent appellate courts have similarly focused on this as a critical element. *See, e.g.*, Gilfillan v. City of Philadelphia, 637 F.2d 924, 931-32 (3d Cir. 1980) (political divisive potential exists in the city's expenditure of over $200,000 to construct a special platform for the Pope's visit); Hall v. Bradshaw, 630 F.2d 1018, 1021-22 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (including a motorists' prayer on a state map by the North Carolina Department of Transportation has the potential for entangling the state in a politically divisive conflict). Note that in both cases political divisiveness was not the *sole* basis for invalidating the challenged practices. The Seventh Circuit appears to be the first court to take that approach.

enth Circuit pointed to the following factors:[166] (1) the Department of Labor determines the amount of funds available to any particular prime sponsor and thus limits the number of CETA workers a prime sponsor may fund; (2) there is much competition for services of CETA workers among potential subgrantees, and no limit exists as to the number of workers any subgrantee may receive; (3) the situation is aggravated by the annual nature of the funding received by subgrantees which provides successive opportunities for political fragmentation and division along religious lines;[167] and (4) decisions are made only after a profusion of comment from the local community, and the prime sponsor who has final responsibility for local funding decisions has a wide degree of discretion in choosing among eligible subgrantee applicants.

The obvious difficulty with the Seventh Circuit's reliance on the political entanglement prong is that this concept can easily be used to strike down all types of aid to religion. In the past, however, the Supreme Court has upheld various forms of aid to parochial schools under the "child welfare theory." This theory, in *Everson v. Board of Education*,[168] for example, supported bus service for children attending parochial schools; yet such a decision made on an annual basis as to which children will be transported to which parochial schools and at what cost to the school district could clearly be another area where political divisiveness is more than a hypothetical problem. In dismissing an appeal in *Springfield School District v. Department of Education*,[169] the Supreme Court recently ruled that the use of public funds to bus students to religious schools up to ten miles beyond the borders of their residential school district does not present a substantial federal question.[170] The Pennsylvania Supreme Court below had relied on the fact that the primary beneficiaries of the program were students and that the busing created only "mechanical" contacts between church and state without any need for excessive surveillance.[171] A recent district court decision specifically rejected political divisiveness as a basis for invalidating nonpublic school busing.[172] The court focused on the relatively insignificant amount of state assistance at issue, the lack of administrative contacts between the board of education and the church

166. 661 F.2d at 616-17.
167. *See* Meek v. Pittenger, 421 U.S. 349, 372 (1975).
168. 330 U.S. 1 (1947).
169. 483 Pa. 539, 397 A.2d 1154, *appeal dismissed*, 443 U.S. 901 (1979).
170. 443 U.S. 901 (1979).
171. 483 Pa. at 565-66, 397 A.2d at 1167-68 (citing TRIBE, *supra* note 4, at 870).
172. Cromwell Property Owners Ass'n v. Toffolon, 495 F. Supp. 915 (D. Conn. 1979).

authorities, and the lack of any public opposition to the transportation program.[173] The court concluded that there was "no basis to find a realistic potential for the degree of political entanglement that has rendered other statutes unconstitutional."[174]

In contrast to these opinions on the busing question, the Seventh Circuit specifically found "a sufficient factual basis to conclude that a serious potential of political divisiveness exists."[175] In addition, it distinguished recent Supreme Court decisions validating various forms of aid to parochial schools which would appear to raise the same political divisiveness problem as that engendered by the CETA program.[176] For example, the court noted that providing uniform diagnostic services on school premises by public employees to *all* school children, upheld by the Supreme Court,[177] did not create as serious a potential for political divisiveness as the CETA program.[178] The court reasoned that a controversy focusing on religion might be more likely to develop with the CETA program which, rather than insuring uniform service to religious and nonreligious institutions alike, holds an annual competition for CETA workers' services.[179] The distinction is a somewhat persuasive one, but it appears to be too slim a reed upon which to develop new constitutional doctrine.

Thus far no courts of appeals have relied solely on the political divisiveness factor to invalidate aid to parochial education; yet this case involving CETA workers and a very special allocation mechanism perhaps warranted the rather innovative position taken by the Seventh Circuit. The major difficulty is that a "potential" for political divisiveness is too easily asserted. *Decker* should be read as a special case where several factors coalesced: the program primarily benefited church-related schools; the program required annual appropriations; and the method of determining appropriations involved the entire community in debate. Thus, political fragmentation and divisiveness on religious lines were likely to be intensified. *Decker* should be read in this light and the court should proceed with caution in future cases to require concrete evidence indicating that political divisiveness is a real danger before it acts to invalidate programs.

173. *Id.* at 925.
174. *Id.*
175. 661 F.2d at 617 n.35.
176. *Id.* at 617 n.36.
177. Wolman v. Walter, 433 U.S. 229 (1977).
178. 661 F.2d at 617 n.36.
179. *Id.*

IV. DUE PROCESS

A. Substantive Due Process: The Right to Terminate Pregnancy

The Seventh Circuit decided only one noteworthy substantive due process case this term.[180] In *Charles v. Carey*,[181] it reviewed the constitutionality of Illinois' newly amended abortion statute—"a statute of daedalian complexity."[182] The most controversial aspect of the case was the determination of the appropriate standard for reviewing laws which regulate abortions. The defendants argued, based on Supreme Court precedent, that the plaintiffs must first show an "undue burden" placed on the abortion decision before the challenged law is subject to strict scrutiny.[183] A close analysis of Supreme Court decisions reveals, as the Seventh Circuit concluded, that " 'undue burden' defines the ultimate constitutional issue, not merely the threshold requirement for strict scrutiny."[184] The court held that statutes which "burden" an individual's right to terminate pregnancy must be subjected to the same strict scrutiny approach as is applied to statutes that prohibit the decision entirely.[185] Once plaintiff has established that the provision "burdens" or "directly interferes" in the pregnancy termination decision, the state must show a compelling basis for the law and that it is narrowly drawn "to express only the legitimate interests at stake."[186]

Applying these legal principles to the Illinois law, the court held

180. Another case, Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981), addressed the question of whether the conditions of confinement violated the due process rights of pretrial detainees being held as "safekeepers" at a state prison in Indiana. Without characterizing it as substantive or procedural, the court found "that the conditions of confinement amount to punishment of the safekeepers and thus violate their rights to due process." *Id.* at 494. By looking at all of the challenged conditions cumulatively rather than separately, the court found the situation distinguishable from Bell v. Wolfish, 441 U.S. 520 (1979), and its earlier decision in Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980). The plaintiffs' case was aided by the fact that they were confined "under conditions more burdensome than those imposed on the general population of convicted felons" in the same institution. 641 F.2d at 494. For a discussion of the Seventh Circuit's treatment this term of discrimination claims, see notes 299-409 *infra* and accompanying text.

181. 627 F.2d 772 (7th Cir. 1980).

182. *Id.* at 775.

183. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 473 (1977); Bellotti v. Baird, 428 U.S. 132, 147 (1976); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 81 (1976). In *Maher*, the Court defined the scope of the fundamental right in Roe v. Wade, 410 U.S. 117 (1973), as protecting "the woman from *unduly burdensome interference* with her freedom to decide." *Id.* at 473-74 (emphasis added). Some authorities have warned that this language may have diminished the importance and altered the nature of the fundamental right recognized in *Roe v. Wade*. *See* Note, Harris v. McRae: *Whatever Happened to the* Roe v. Wade *Abortion Right?*, 8 PEPPERDINE L. REV. 861, 892 (1981); Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313 (1981). The Seventh Circuit apparently rejects this notion.

184. 627 F.2d at 777.

185. *Id.* at 777-78.

186. *Id.* at 777.

that although an informed consent provision could validly be required,[187] various components of the statute constituted "an unconstitutional 'straitjacket' on the physician's ability to counsel with his patient."[188] The court found no compelling justification for requiring (1) that the woman view state-prepared materials on the anatomical and physiological features of the fetus at various gestational ages; (2) that the physician inform the woman of the possibility of "organic pain" to the fetus; (3) that the physician who performs the abortion conduct the informed consent consultation himself and present the woman with a true copy of her pregnancy test results; and (4) that a twenty-four-hour mandatory waiting period transpire between the consultation and the operation.[189]

The court's refusal to impose an "undue burden" standard on the plaintiff in abortion cases as well as its substantive holdings on informed consent and waiting period requirements were recently followed by the Sixth Circuit, overruling an earlier district court decision upon which the defendant had relied in *Carey*.[190] Court of appeals decisions in the First and Eighth Circuits have also struck down similar attempts "to regulate" the abortion decision. Applying a compelling state interest standard, the Eighth Circuit in two recent cases invalidated waiting period requirements as well as burdensome informed consent requirements.[191] By requiring physicians to give patients information contrary to their best judgment or medical opinion, the statutes were held to interfere with the right of a woman to consult with her physician regarding the abortion decision free from state interference: "There is no rational reason, much less a compelling state interest, that justifies forcing physicians to give women information that the physi-

187. *Id.* at 782 (citing Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976)). In *Danforth*, the Supreme Court upheld a written consent requirement as imposing "no burden" on the woman's decision and therefore not even triggering further constitutional analysis. The Court defined a valid consent form as one simply providing information "as to just what would be done and as to its consequences." 428 U.S. at 67 n.8.

188. 627 F.2d at 784.

189. *Id.* at 781-82.

190. Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198 (6th Cir. 1981), *rev'g* 479 F. Supp. 1172 (N.D. Ohio 1979). The court applied a two-step analysis. First, does the regulatory provision have a "legally significant impact" on the woman's right to terminate her pregnancy? If so, does the provision serve a compelling state interest which does not impose an "undue burden" on the abortion decision? 651 F.2d at 1204. The concurring opinion rejected this two-step analysis as not justified by Supreme Court precedent and also criticized the Seventh Circuit's analysis in *Carey*. 651 F.2d at 1215 & n.5 (Kennedy, J., concurring in part and dissenting in part).

191. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir.), *supplemented after remand*, 664 F.2d 687 (8th Cir. 1981); Women's Servs. v. Thone, 636 F.2d 206 (8th Cir. 1980).

cians consider injurious to the woman's health or simply untrue."[192] For similar reasons, the First Circuit granted a preliminary injunction against a Massachusetts statute requiring a twenty-four-hour waiting period as well as a description of development of the unborn child.[193] While upholding other aspects of its informed consent requirement, the court reasoned that the information on fetal development was medically irrelevant and could cause emotional distress.[194] Thus, the Seventh Circuit opinion falls in line with the majority of federal courts on abortion regulation questions.

Although recent Supreme Court decisions involving both abortion funding[195] and a minor's abortion decision[196] have cast some doubt on the need to justify all abortion laws under a compelling interest standard, the Seventh Circuit was correct in rejecting these precedents. The Court in the abortion funding cases stressed that the challenged statutes did not place any limitations on the right to have an abortion; therefore, the government only had to demonstrate a rational relationship between the decision not to fund and its decision to favor childbirth over abortion. Although still recognizing that the government could not interfere with the exercise of a fundamental right, the Court found no affirmative funding obligation to remove economic barriers.[197]

As to the cases involving a minor's abortion decision, the Court stressed the important considerations of family integrity and protecting dependent adolescents, which are not at stake with the mature woman.[198] Absent further guidance from the Supreme Court, the Seventh

192. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848, 868 (8th Cir.), *supplemented after remand*, 664 F.2d 687 (8th Cir. 1981). Earlier, in *Thone*, the Eighth Circuit had cited *Carey* to support its application of the strict scrutiny analysis. 636 F.2d at 210.

193. Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981). It should be noted that the First Circuit, rather than applying the *Carey* approach, proceeded to balance the burdens imposed and interests served by various aspects of the challenged consent form. *Id.* at 1017-22. As to the aspects of the provision the court found invalid, it specified that the required information served *no* state interest at all. *Id.* at 1022.

194. *Id.* at 1021-23. *See also* Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), *aff'd*, 440 U.S. 941 (1979); Leigh v. Olson, 497 F. Supp. 1340 (D.N.D. 1980); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980). Both *Edwards* and *Olson*, in addition to striking down informed consent requirements, also invalidated mandatory waiting periods. *Accord*, Women's Community Health Center, Inc. v. Cohen, 477 F. Supp. 542 (D. Me. 1979). *But see* Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976) (upholding a 24-hour requirement).

195. *E.g.*, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

196. *See* cases cited note 198 *infra*.

197. In *Maher*, the Court stated, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." 432 U.S. at 475. The Court also emphasized that its decision "signals no retreat from *Roe* [*v. Wade*] or the cases applying it." *Id.*

198. *See* H.L. v. Matheson, 450 U.S. 398, 409 (1981) ("a 'mere requirement of parental notice' does not violate the constitutional rights of an immature, dependent minor"); Bellotti v. Baird, 443 U.S. 622, 637-39 (1979) (applying a rational relationship test to a statute alleged to impermissibly

Circuit was thus correct in applying the strict scrutiny analysis originally set forth in *Roe v. Wade*:[199] "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[200] Requiring plaintiffs to establish an "undue burden" and permitting a court to initially determine when a burden on the decision to abort becomes "undue" would be setting a precedent dangerous to the protection traditionally afforded fundamental rights.[201]

B. Procedural Due Process

Most of the Seventh Circuit's due process decisions concerned procedural due process and there were several cases of interest. These will be examined in accordance with the well-established two-step analysis, *i.e.*, whether there is a constitutionally protected liberty or property interest[202] and, if so, what procedures are required.[203] The inquiry relative to the first part of the analysis is found in several cases involving federal statutory programs[204] and several cases involving changes in

burden the right of a minor to an abortion); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 73 (1976) (same). *See also* Planned Parenthood League v. Bellotti, 641 F.2d 1006, 1012-13 (1st Cir. 1981) (same).

199. 410 U.S. 113 (1973).

200. *Id.* at 155 (citations omitted).

201. The only recent case which suggests that the Court may be retreating from strict scrutiny analysis is Gary-Northwest Ind. Women's Servs., Inc. v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd mem. sub nom.* Gary-Northwest Ind. Women's Servs., Inc. v. Orr, 451 U.S. 934 (1981), upholding a provision requiring that all second trimester abortions be performed in a hospital. The absence of an opinion from the Court is unfortunate, especially in light of contrary rulings on the same question. *See, e.g.*, Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980), *rev'd in part and remanded for further proceedings*, 655 F.2d 848 (8th Cir.), *supplemented after remand*, 664 F.2d 687 (8th Cir. 1981). Presumably the Court adopted the defendant's position that the state's interest in protecting maternal health, which becomes compelling by the second trimester, justified the requirement, but it is, of course, unknown what standard of review the Court used in reaching its conclusion. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.")

202. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

203. *See* Mathews v. Eldridge, 424 U.S. 319 (1976).

204. Three of these will be examined below: Uptown People's Community Health Servs. Bd. of Directors v. Board of Comm'rs, 647 F.2d 727 (7th Cir. 1981); Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981); Davis v. Ball Memorial Hosp. Ass'n, 640 F.2d 30 (7th Cir. 1980). A fourth, Anthony v. Wilkinson, 637 F.2d 1130 (7th Cir. 1980), involved transfers of inmates from state to federal prisons. The court found that, since 18 U.S.C. § 5003(a) (1976) requires a showing of need for specialized treatment as a condition precedent to transfer, there is a protected liberty interest absent such a determination. 637 F.2d at 1141. The removal of discretion from prison officials to transfer for any or no reason distinguished *Anthony* from Montanye v. Haymes, 427 U.S. 236 (1976), and Meachum v. Fano, 427 U.S. 215 (1976). After *Anthony* was decided, the Supreme

employment status.[205]

Holbrook v. Pitt[206] was an action on behalf of tenants found eligible for a rent subsidy under section 8 of the Housing Act of 1937, as amended by section 201(a) of the Housing and Community Development Act of 1974.[207] The plaintiffs claimed a right to retroactive rent subsidy payments as third-party beneficiaries of contracts executed between the United States Department of Housing and Urban Development[208] and the homeowners. Applying federal common law,[209] the court concluded that the plaintiffs had enforceable rights under the contracts and that "HUD breached its obligation to properly administer the Contracts, . . . and its coordinate responsibility to third-party beneficiaries to fulfill the purposes of the Contracts, i.e., to provide full assistance benefits to certified families."[210] Having decided that the plaintiffs could recover retroactive benefits from HUD, the court addressed the question of whether due process "requires HUD to establish procedures to provide already certified tenants with notice and opportunity to be heard concerning the provision of retroactive benefits."[211]

Based on the tenants' legitimate claim of entitlement as third-party beneficiaries under the contracts, the court had little trouble in finding a protected property interest. While it was recognized that the owner would have discretion in the certification process and the initial selection of tenants, once tenants were certified they had an entitlement to the benefits under the terms implied in the contract.[212] The case was remanded to the district court for a determination of the "precise contours of the requirements of procedural due process in the context of

Court, in Howe v. Smith, 101 S. Ct. 2468 (1981), held that § 5003(a) does not limit transfers to inmates needing specialized treatment.

205. Margoles v. Tormey, 643 F.2d 1292 (7th Cir. 1981); Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980); Elbert v. Board of Educ., 630 F.2d 509 (7th Cir. 1980), *cert. denied*, 450 U.S. 1031 (1981); Gaballah v. Johnson, 629 F.2d 1191 (7th Cir. 1980).

206. 643 F.2d 1261 (7th Cir. 1981).

207. 42 U.S.C. § 1434f (1976).

208. Hereinafter referred to as HUD.

209. The court distinguished Miree v. DeKalb County, 433 U.S. 25 (1977), in concluding that federal common law would apply; the court referred to the fact that a federal agency was a party and that the outcome of the case would directly affect substantial financial obligations of the United States. 643 F.2d at 1270 n.16.

210. 643 F.2d at 1276.

211. *Id.*

212. In a lengthy footnote, the court indicated that the plaintiffs, at a minimum, had a claim which "must be deemed to be that of *applicants* for retroactive benefits" and cited numerous cases in support of the proposition that "[a]pplicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause." *Id.* at 1278 n.35 (emphasis in original).

this case."[213] The court did indicate that it would require, at a minimum, that all tenants receive prompt notice of their right to receive retroactive payments, a written statement setting forth the reasons for any denial of retroactive benefits, the opportunity to challenge the sufficiency of HUD's reasons and a hearing before the benefits are finally denied.[214]

In *Davis v. Ball Memorial Hospital Association*,[215] a case involving benefits under the Hill-Burton Act,[216] the plaintiffs asserted due process violations resulting from the federal and state defendants' failure to require medical facilities to notify them of the availability of uncompensated services, to give reasons for the denial of an application for such services and to provide an opportunity for a hearing. Under the Hill-Burton Act, which provides federal financial assistance for the construction and modernization of medical facilities, a facility receiving federal funds has to give assurances that it will provide "a reasonable volume of services to persons unable to pay therefor" to the extent that the financial condition of the facility permits.[217] New regulations adopted by the Secretary of the Department of Health, Education and Welfare mooted several of the plaintiffs' procedural claims; however, they did not provide for a hearing as requested by the plaintiffs.[218] In addressing the question whether the plaintiffs had a protected property interest, the court noted the resemblance to *Goldberg v. Kelly*[219] in that the federal regulations set out specific eligibility requirements. An important distinguishing element, however, made the due process inquiry much more difficult: under the Hill-Burton regulations, not every applicant meeting the eligibility criteria would necessarily be entitled to assistance. This is true because medical facilities were required to provide uncompensated services only up to a certain percentage of either operating costs or the federal funds received.[220] Thus, there was no assurance that an eligible applicant would actually receive free services.

Nevertheless, the court found that the plaintiffs had an enforceable, protected property interest in the medical facilities' compliance

213. *Id.* at 1281.
214. *Id.*
215. 640 F.2d 30 (7th Cir. 1980).
216. 42 U.S.C. §§ 291 to 291o-1 (1976 & Supp. III 1979).
217. *Id.* § 291c(e).
218. The court held that a plaintiff seeking to establish due process procedures does not have to allege that "he or she actually sought each particular procedure due process requires." 640 F.2d at 37.
219. 397 U.S. 254 (1970).
220. *See* American Hosp. Ass'n v. Harris, 625 F.2d 1328, 1330, 1338-40 (7th Cir. 1980) (Pell, J., concurring in part and dissenting in part).

with the assurances provided under the Act.[221] In reaching this conclusion, the court relied heavily on the analysis in Judge Hufstedler's dissent in *Geneva Towers Tenants Organization v. Federated Mortgage Investors*:[222]

> An entitlement is a legally enforceable interest in receiving a governmentally conferred benefit, the initial receipt or the termination of which is conditioned upon the existence of a controvertible and controverted fact. Such an interest cannot be impaired or destroyed without prior notice to the beneficiary and a meaningful opportunity for him to be heard for the purpose of resolving the factual issue.[223]

In *Davis*, the enforceable right or interest was found through a close examination of the Hill-Burton Act and its history. Two factors were considered important. First, the fact that the Act gave the plaintiffs standing to sue the medical facilities was "an initial index of an enforceable interest."[224] In other words, the "requirement of some enforceable interest is 'akin' to the requirement of standing."[225] Second, the court pointed to the plaintiffs' private right of action to sue the medical facilities.[226] This "almost by definition, reflects the very sort of Congressional intendment to confer some enforceable interest upon these beneficiaries that Judge Hufstedler regarded as indicative of this first element of a protectible property interest."[227]

Regarding Judge Hufstedler's requirement that an enforceable interest be conditioned "upon the existence of one or more controvertible and controverted facts,"[228] *i.e.*, the "practical side of due process,"[229] the court found that questions concerning an applicant's initial eligibility would supply this element.[230] It was concerned, however, about the practicality of a hearing because the need to prove that the particular medical facility had not met its financial obligations for the year could turn the hearing into full-scale litigation.[231] This apparent dilemma was resolved on the basis of the Act and regulations which anticipate that claimants would ordinarily have to demonstrate only their eligibility and that only in the uncommon case would the facility seek to show

221. 640 F.2d at 43.
222. 504 F.2d 483 (9th Cir. 1974).
223. *Id.* at 495-96 (Hufstedler, J., dissenting).
224. 640 F.2d at 42.
225. *Id.* at 41-42.
226. *Id.* at 42.
227. *Id.*
228. *See* text accompanying note 223 *supra*.
229. 640 F.2d at 43. A factual dispute is needed to serve the practical side of due process because absent such a dispute notice and a hearing would be "pointless." *Id.* at 41.
230. *Id.* at 42-43.
231. *Id.* at 42.

exhaustion of its yearly compliance requirement.[232] Having reduced the practical concern in this way, the court found that the enforceable interest in the facilities' compliance with their assurances under the Hill-Burton Act reached entitlement status.[233] It remanded to the district court the question of what process is due.[234]

Uptown People's Community Health Services Board of Directors v. Board of Commissioners[235] also involved a search for a protected property interest in the context of a federal statutory program. Pursuant to an agreement between the Health and Hospitals Governing Commission and the Health Services Board of Directors, the Board had established and operated a community outpatient health clinic in the Uptown area of Chicago. When the Commission indicated its intention to divorce itself from the Board and run the clinic on its own until a new Board could be created, suit was filed alleging breach of contract and a violation of due process. Since the only jurisdictional basis for deciding the contractual claim was pendent jurisdiction, the court indicated that the first question to be answered was whether the plaintiffs had alleged a substantial federal claim.[236] This led to an inquiry of whether the plaintiff Health Services Board had a constitutionally protected property right.

After examining the agreement very closely, the court concluded that it simply did not create an entitlement to continue operating the clinic indefinitely.[237] While the agreement reflected the Commission's interest in having locally operated clinics and the Board's desire to run a clinic independently, the "expression of a goal and the desire to attain it does not, however, rise to the level of an explicit mutual expectancy that the Board is *entitled* to acquire the clinic for its exclusive use upon meeting the agreement's conditions."[238]

Several employment cases also dealt with the question of whether there was a protected interest triggering due process requirements. In *Gaballah v. Johnson*,[239] a doctor employed by the Veterans Administration[240] was dropped from a GS-13 position to a GS-9 position as a

232. *Id.* at 43.
233. *Id.*
234. *Id.* In reaching its conclusion the Seventh Circuit found unpersuasive the district court opinion in Newsom v. Vanderbilt Univ., 453 F. Supp. 401 (M.D. Tenn. 1978). *Newsom* was subsequently reversed. 653 F.2d 1100 (6th Cir. 1981).
235. 647 F.2d 727 (7th Cir.), *cert denied*, 102 S. Ct. 328 (1981).
236. 647 F.2d at 732-33.
237. *Id.* at 738.
238. *Id.* at 735 (emphasis in original).
239. 629 F.2d 1191 (7th Cir. 1980). *See also* text accompanying notes 364-68 *infra*.
240. Hereinafter referred to as VA.

result of a general reduction in workforce. During a three-year period subsequent to his demotion, five positions became available at GS-11 or -12 levels. Gaballah was qualified for each job, had a right under VA regulations to be considered for each position before it was posted and had a right to receive written reasons if he was not selected. Nevertheless, he did not receive any of the jobs; in fact, he received no prior consideration and did not receive written reasons indicating why he was not selected.

Concerning the irregularities in filling those positions, the court found that the plaintiff did not have a protected right to be promoted nor did he have a property interest in any particular form of consideration for promotion.[241] It was also noted that a violation of the agency's general procedural rules relating to promotions did not create any personal rights, either substantive or procedural, for the plaintiff.[242] Rather, the court decided that the rules were intended to "protect only the generalized interest in filling positions with the best qualified personnel in the agency" and that this interest "belongs as much to the agency and the public in general as it does to Gaballah."[243] However, the court did find that the agency rules providing that a demoted employee be given preferential consideration for promotions for which he is qualified did "confer important procedural benefits upon [Gaballah]."[244] These rules were "viewed as creating a legitimate claim of entitlement to promotion absent the articulation of some valid written reason for non-selection,"[245] and the failure to follow the rules violated Gaballah's property rights.[246]

241. 629 F.2d at 1202. His position was found similar to that of a nontenured assistant professor who had no property right in a promotion. McElearney v. University of Illinois, 612 F.2d 285, 291 (7th Cir. 1979).

242. 629 F.2d at 1202-03.

243. *Id.* at 1203.

244. *Id.*

245. *Id.* Compare this to the holding in Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981), to the effect that regulations

> which require consideration of various factors prior to transferring a prisoner, establish procedures for the exercise of discretion, but they do not limit the decision to transfer to any particular reason. Without such a limitation, the regulations do not recognize any right on the part of the prisoner to serve in a particular institution.

643 F.2d at 1290 (citing Meachum v. Fano, 427 U.S. 215, 228 (1976)). In Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), the court held that Hawaii prison regulations defining an interstate transfer as a "grievous loss" and requiring a prior hearing before an impartial committee give rise to a constitutionally protected liberty interest. *Id.* at 711-12. Breach of a statute regarding notice, resulting in some delay in the notice, was not deemed a violation of due process in United States v. Warden, Stateville Correctional Center, 635 F.2d 656, 658-59 (7th Cir. 1980).

246. The dismissal of this claim was nevertheless affirmed because the officials responsible for providing preferential consideration were not named as defendants. *See generally* notes 475-83 *infra* and accompanying text.

Three of the employment cases involved the application of *Board of Regents v. Roth*[247] and *Paul v. Davis*[248] to situations where changes in employment status were accompanied by damage to reputation. In the first, *Endicott v. Huddleston*,[249] the plaintiff was found not to have a property interest in continued employment as supervisor of assessments because state law guaranteed him only one four-year term and not reappointment.[250] State law granted such an incumbent a public hearing "on the question of why he is not to be reappointed,"[251] but the purpose of this was to provide an opportunity to preserve his reputation, not to save his job.[252] Thus, the right to such a hearing did not create a property interest. However, the plaintiff was found to have a liberty interest because several of the reasons for his nonappointment impugned his honesty and integrity.[253] Under *Roth* and *Paul*, such damage to reputation, without more, does not infringe upon a constitutionally protected liberty interest. The Seventh Circuit found, however, that the "conjunction of stigma to reputation and failure to rehire" did rise to the level of a protected liberty interest;[254] thus, the plaintiff was entitled to notice and a hearing affording him an opportunity to clear his name.[255]

Defamatory statements signifying interference with a liberty interest were also involved in *Elbert v. Board of Education*.[256] In *Elbert*, the plaintiff school superintendent was notified that his contract would not be renewed, in part because of an alleged misuse of public funds. Several months after voting to terminate the plaintiff, a new board of education reversed the decision and voted to offer him a contract for the following school year. At the same time, a public statement was issued indicating that, while the plaintiff had made some errors of judgment, he had not misused public funds. Because there was no actual break in his employment, it was found that no property right was infringed.[257]

247. 408 U.S. 564 (1972).
248. 424 U.S. 693 (1976).
249. 644 F.2d 1208 (7th Cir. 1980).
250. *Id.* at 1214.
251. *Id.*
252. *Id.*
253. *Id.* at 1215.
254. *Id.* at 1216.
255. *Id.* A second public hearing had been held and it satisfied the procedural requirements of due process. However, because the first hearing did not comport with due process, the plaintiff was entitled to recover damages for any loss suffered as a result of the first inadequate hearing. Such damages amounted to his attorney's fees expended in obtaining a second hearing. *Id.* at 1216-17. *See also* Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981).
256. 630 F.2d 509 (7th Cir. 1980), *cert. denied*, 450 U.S 1031 (1981).
257. 630 F.2d at 512.

The court found the alleged infringement of his liberty interest resulting from the defamation to be controlled by *Paul*.[258] Thus, absent an actual loss of employment, there was nothing more than an alleged defamation alone. Deprivation of a liberty interest requires "stigma plus," *i.e.*, the stigma must be accompanied by an actual loss of employment.[259]

The final case involving "stigma plus," *Margoles v. Tormey*,[260] concerned an applicant for a medical license in Illinois who claimed that a letter from the defendant Wisconsin officials, misrepresenting that he had been convicted of attempting to bribe a judge, severely prejudiced his application and contributed to the denial of his license. Even assuming the plaintiff proved a stigma resulting from the defendants' correspondence,

> the "stigma *plus*" test is not satisfied. Plaintiff has failed to prove that these defendants were connected with any denial of a government benefit or privilege, i.e. licensure. The affiliation between stigma and denial of a government benefit is absent. Although defendants' actions may have imposed a stigma on plaintiff's reputation, plaintiff's claim fails to establish that defendants' defamation was "*in conjunction*" with the denials of licensure in Illinois. The Illinois authorities and the Illinois denials of licensure were separate and distinct from any defamatory statements made by these Wisconsin officials.[261]

These three "stigma plus" cases generally represent an affirmation and application of the test as stated earlier by the Seventh Circuit in *Colaizzi v. Walker*:[262]

> [S]tigma to reputation (not itself a deprivation of liberty as defined in the Fourteenth Amendment) plus failure to rehire or discharge (not necessarily involving deprivation of property as defined in the Fourteenth Amendment) may nevertheless when found *in conjunction* state a claim under 42 U.S.C. § 1983 for deprivation of a Fourteenth Amendment liberty interest without due process.[263]

Probably the most disturbing aspect of these cases is the majority's refusal in *Elbert* to recognize the negative impact of the defamation on the plaintiff's opportunities for other employment as satisfying the

258. *Id.* at 513.

259. A claimed loss of a liberty interest failed in *Gaballah* for the same reason. 629 F.2d at 1202. The dissent in *Elbert* would have found the required "plus" in the superintendent's allegations that his employment opportunities elsewhere were negatively affected and that he was unsuccessful in finding employment elsewhere after the announcement of his termination. 630 F.2d at 514-15 (Baker, J., dissenting).

260. 643 F.2d 1292 (7th Cir. 1981).

261. *Id.* at 1299 (emphasis in original).

262. 542 F.2d 969 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977).

263. 542 F.2d at 973 (emphasis in original).

"plus" requirement.[264]

The reasoning behind *Paul, i.e.*, the unwillingness to "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,"[265] played a role in a recent Supreme Court decision concerning the negligent handling of a prisoner's property which arrived at the institution by mail. In *Parratt v. Taylor*,[266] the Court recognized that the plaintiff's claim satisfied three prerequisites of a valid due process claim,[267] but indicated that these do not establish a violation of the fourteenth amendment unless the available state tort remedies fail to satisfy the requirements of procedural due process.[268] After stating that prior cases do not *always* require a hearing before the initial deprivation of property,[269] the Court found that the state tort remedies "could have fully compensated the [plaintiff] for the property loss" and were, therefore, "sufficient to satisfy the requirements of due process."[270] Thus, there was no violation of the due process clause.

Parratt represents the second level of analysis required in procedural due process cases, *i.e.*, assuming a protected interest, what process is due? In *Parratt*, only postdeprivation procedures were required, at least in part because it would be difficult, if not impossible, for the state to provide a meaningful hearing before the unauthorized taking by state agents.[271]

The timing of the hearing was also at issue before the Seventh Circuit this term in *Ciechon v. City of Chicago*,[272] where the parties stipulated that firefighters who were suspended because they were not residents of Chicago have a protected property interest which cannot be taken without due process.[273] Based on a balancing of the three factors established by the Supreme Court in *Mathews v. Eldridge*[274]—the pri-

264. *See* 630 F.2d at 514-15 (Baker, J., dissenting).

265. 424 U.S. 693, 701 (1976).

266. 451 U.S. 527 (1981).

267. "[T]he petitioners acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to a deprivation." *Id.* at 536-37.

268. *Id.* at 537.

269. *Id.* at 540.

270. *Id.* at 544.

271. The taking was deemed unauthorized because it was the result of the agents' failure to follow established state procedures. *Id.*

272. 634 F.2d 1055 (7th Cir. 1980).

273. *Id.* at 1058. *But see* Wren v. Jones, 635 F.2d 1277 (7th Cir. 1980), in which prelayoff hearings were not required when layoffs were based on fiscal restraints rather than political motivations. *Id.* at 1288.

274. 424 U.S. 319 (1976).

vate interest which will be affected, the risk of an erroneous deprivation of this interest, and the governmental interest[275]—the Seventh Circuit concluded that a presuspension hearing was not required.[276] The only question remanded to the district court was whether the city procedures assured a prompt postsuspension hearing as required by due process. In balancing the *Mathews* factors, the court stated,

> The City has an important interest in enforcing its ordinances; the initial decision to suspend is based on internal investigation results and documentary evidence which is reviewed at three levels before suspension is imposed, and the postsuspension procedure provides for a full evidentiary hearing; the effect on the private interest (intervenors' entitlement to their salaries and employee benefits) is minimized by the recovery of back-pay and full restoration to rank that intervenors will receive if they ultimately prevail.[277]

This case is also worth noting for its discussion of the role of a preliminary injunction in employment suspension cases.[278] The lower court had issued a preliminary injunction enjoining the suspensions; this was the basis for the appeal.[279] After noting that appellate review of an order granting a preliminary injunction is limited and will be set aside only where there is an abuse of discretion,[280] the court disagreed with the lower court's finding "that loss of wages, employee benefits, and opportunities for promotion during the suspension period constituted irreparable injury."[281] Relying in part on the Supreme Court decision in *Sampson v. Murray*,[282] the court held that the losses did not result in irreparable harm because the firefighters could ultimately receive back pay and restoration to their respective ranks if successful at their hearings.[283] This reasoning would be questionable if a plaintiff

275. *Id.* at 334-35.

276. 634 F.2d at 1059.

277. *Id.* In reaching this conclusion the court relied in part on Barry v. Barchi, 443 U.S. 55 (1979). Judge Sprecher, however, dissented on the basis of *Barry*, arguing that "the city's interest in suspending a non-resident but experienced firefighter is so appreciably less than New York's interest in upholding the integrity of horse racing and gambling thereon, that this case also constitutionally warrants a *presuspension* hearing." 634 F.2d at 1062 (Sprecher, J., dissenting) (emphasis in original).

278. Three other civil rights cases in the Seventh Circuit this term involved review of a lower court ruling on a request for a preliminary injunction. *See* O'Connor v. Board of Educ., 645 F.2d 578 (7th Cir.), *cert. denied*, 102 S. Ct. 641 (1981); EEOC v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980); Charles v. Carey, 627 F.2d 772 (7th Cir. 1980).

279. The appeal was filed under 28 U.S.C. § 1292(a)(1) (1976). Two other cases, Davis v. Ball Memorial Hosp. Ass'n, 640 F.2d 30, 34-36 (7th Cir. 1980), and Adashunas v. Negley, 626 F.2d 600, 602 (7th Cir. 1980), addressed at some length the appealability of orders denying preliminary injunctions.

280. 634 F.2d at 1057.

281. *Id.*

282. 415 U.S. 61 (1974).

283. 634 F.2d at 1057-58.

makes a showing that the loss of employment has an impact broader than the loss of wages, *e.g.*, loss of resources necessary to obtain the basic necessities of life.

Several other Seventh Circuit decisions this term addressed the nature of the process which is due once it is determined that a protected interest exists. Again relying on the *Mathews* factors,[284] the court in *Holbrook v. Pitt*[285] held that the tenants must receive prompt notification of their right to receive retroactive benefits and a written statement setting forth the reasons for any denial of such benefits with an indication of how to challenge the sufficiency of the agency's reasons.[286] The importance of a statement of findings or evidence and the reasons for the agency ruling was stressed in several cases. In *Busche v. Burkee*,[287] the justification for such a statement was given as follows:

> A written statement by factfinders as to the evidence relied on and reasons for its decision serves several interests. It allows for more effective review of the factfinder's decision, helps to insure that the factfinder acts fairly, and protects the subject of the inquiry from "collateral consequences based on a misunderstanding of the nature of the original proceeding."[288]

In *Chavis v. Rowe*,[289] the court held that the right to a written statement giving the facts relied on and the reasons for conclusions reached was so clearly established that the defendant prison officials were not entitled to a qualified immunity.[290] The failure to make an appropriate administrative record was also fatal to the defendants in *Hayes v. Thompson*.[291] The court emphasized that the prison disciplinary committee's reasons, both for denying witnesses[292] and for a finding of guilty, must appear in the administrative record.[293] It is not sufficient to supply the reasons through testimony and subsequent judicial pro-

284. *See* text accompanying note 275 *supra*.

285. 643 F.2d 1261 (7th Cir. 1981). *See* notes 206-14 *supra* and accompanying text.

286. 643 F.2d at 1281.

287. 649 F.2d 509 (7th Cir.), *cert. denied*, 102 S. Ct. 396 (1981).

288. 649 F.2d at 516 (quoting Wolff v. McDonnell, 418 U.S. 539, 565 (1974)). For an example of an acceptable statement of the evidence relied upon, see United States v. Warden, Stateville Correctional Center, 635 F.2d 656, 659 (7th Cir. 1980).

289. 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981).

290. 643 F.2d at 1288. As to another due process violation in *Chavis*, the failure to inform the plaintiff of the substance of an investigatory report containing exculpatory evidence, the court found that the right was not so clearly established and the defendants were therefore entitled to prove that they acted in good faith. *Id.* at 1289.

291. 637 F.2d 483, 488-89 (7th Cir. 1980).

292. The right to call witnesses at administrative hearings involving prison discipline is not absolute; this was made clear in Gibson v. McEvers, 631 F.2d 95 (7th Cir. 1980), in which the court indicated there was no right to call witnesses to present evidence when "only lesser penalties were imposed." *Id.* at 98.

293. 637 F.2d at 488.

ceedings. Such after-the-fact explanations are suspicious because they do not protect the inmate from arbitrary official action and only an adequate administrative record enables the inmate to make an intelligent decision as to whether judicial review should be sought.

The importance of the three factors identified in *Mathews* in determining what process is due was recently reaffirmed by the Supreme Court in *Little v. Streater*.[294] In *Little*, application of the *Mathews* factors led to the conclusion that Connecticut paternity proceedings resulted in a denial of due process in the case of an indigent defendant who could not meet the cost of blood tests.[295] The private interests were found to be substantial because of the potential support obligation, possible sanctions for noncompliance and the creation of an important parent-child relationship.[296] Because of the reliability of the scientific blood test evidence, particularly in relation to other types of evidence in paternity actions, the risk of an erroneous determination is not inconsiderable. While the state has an obvious interest in the welfare of children born out of wedlock and in securing support for such children, it also wants accurate and just paternity determinations. The state's monetary interest in avoiding the cost of blood tests was not significant enough to overcome the private interests.[297] Therefore, the Court concluded that without blood test evidence, the indigent defendant was not provided "a meaningful opportunity to be heard."[298]

While the required two-step analysis remains clear, the decisions of both the Seventh Circuit and the Supreme Court continue to demonstrate the flexibility of procedural due process requirements and the need for careful case-by-case application of the two-step analysis.

V. Sex and Age Discrimination

The Seventh Circuit decided several cases this term involving discrimination litigation. The court generally followed well-established principles laid down in previous Supreme Court decisions to handle the constitutional as well as the federal statutory issues it faced.[299]

294. 452 U.S. 1 (1981).
295. *Id.* at 12.
296. *Id.* at 13.
297. *Id.* at 16.
298. *Id. Cf.* Lassiter v. Department of Social Servs., 452 U.S. 18, 31-32 (1981) (*Mathews* factors might require appointment of counsel in proceedings to terminate parental rights; there must be a case-by-case application of the factors by the trial courts).
299. In a nondiscrimination decision arising under the equal protection clause, the Seventh Circuit applied traditional rational basis analysis in upholding a provision under Illinois' Aid to Families with Dependent Children (AFDC) program. In Mandley v. Quern, 635 F.2d 659 (7th Cir. 1980), the plaintiffs challenged the "special needs" provision of the program which pays bene-

A. Sex Discrimination: Separate But Equal

Perhaps the most controversial equal protection decision handed down by the court this term was *O'Connor v. Board of Education*[300] in which a sixth grade girl challenged her exclusion from the boys' basketball team. The district court had issued a preliminary injunction based on its finding that the school's classification violated O'Connor's fundamental "right to develop" as well as her fundamental right to an education.[301] Although the district court had recognized the school's compelling interest in maximizing participation in sports, the district court judge concluded that the program was not the least restrictive means by which its interests could be protected. Thus, it found that O'Connor had demonstrated a likelihood of success on the merits warranting a preliminary injunction.[302]

On appeal, the Seventh Circuit held that the district court had abused its discretion; it had erred primarily in using a strict scrutiny standard because the Seventh Circuit recognized no right to personal development nor any fundamental right to an education which would trigger the stricter review.[303] The court instead applied the well-established gender-based discrimination test requiring the state to show important governmental objectives and that the means are substantially

fits to AFDC families under certain enumerated emergency circumstances. The plaintiffs argued that the provision should also cover other special need circumstances, namely theft of cash, eviction for nonpayment of rent, termination of utility services or loss or delay of AFDC checks. The Seventh Circuit held that there was no constitutional right to obtain welfare from the government and since the plaintiffs have no fundamental "right to survive," the provision only had to withstand rational basis analysis in order to be deemed constitutional. *Id.* at 661. The court easily found a rational basis for the provisions of the program and upheld its validity. The decision falls in line with a series of Supreme Court cases upholding various aspects of the government welfare program. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (upholding Maryland's monthly ceiling on AFDC grants to individual families, regardless of family size or need). *But see* Bacon v. Toia, 648 F.2d 801 (2d Cir.), *prob. juris. noted*, 102 S. Ct. 969 (1981), in which the Second Circuit held that a provision of New York's emergency assistance program denying emergency aid (1) to persons eligible for or receiving AFDC grants and (2) in cases where the emergency arose from the loss, theft or mismanagement of a regular public assistance grant violated the equal protection clause. The court concluded that the line-drawing process did not rest "on a rational foundation." 648 F.2d at 809.

Perhaps more noteworthy was the Seventh Circuit's decision in Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981), in which the court did find a violation of equal protection resulting from the "significantly more burdensome conditions" imposed on pretrial detainees as compared to convicted prisoners. Although applying the very lenient rational basis standard, the court could find no rational justification for the different treatment. *Id.* at 498. This conclusion is significant because the Supreme Court has on only a few occasions found that the rational basis standard could not be met. *See* TRIBE, *supra* note 4, at 996-99.

300. 645 F.2d 578 (7th Cir.), *cert. denied*, 102 S. Ct. 641 (1981).

301. 645 F.2d at 579.

302. *Id.*

303. *Id.* at 580-81.

related to the achievement of those objectives.[304] The court determined that the teams for boys and girls were equal in terms of funding, facilities and other objective criteria, and that " 'separate but equal' teams have received endorsement in many circuits."[305] It found, as had the district court, that maximization of participation in sports did constitute a compelling justification for the separate teams, and it therefore concluded that the sex-based classification substantially furthered an important government objective, thus satisfying the equal protection clause.[306] Again noting that it was simply reviewing the correctness of the preliminary injunction, the court held that the defendants had sufficiently demonstrated that their programs substantially served the objective of increasing girls' participation in sports.[307]

The question of "separate but equal" facilities for boys and girls is not new in the courts. In *Vorchheimer v. School District of Philadelphia*,[308] the Supreme Court was presented with the question of whether Philadelphia could maintain sex-segregated secondary schools for academically gifted boys and girls. The Court split four-to-four, illustrating the uncertainty in this area.[309] The most troublesome part of the *O'Connor* case was its reliance upon Justice Stevens' earlier opinion in the case denying a petition to vacate a stay of the order the district court had granted.[310] Justice Stevens had concluded that the girls' program would offer O'Connor opportunities that were equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. He remarked, "If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case."[311] This approach was forecast in earlier opinions of Justice Stevens,[312] as well as those of Justice

304. *Id.* at 580 (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), and Craig v. Boren, 429 U.S. 190 (1976)).

305. 645 F.2d at 581.

306. *Id.* at 580.

307. *Id.* at 581.

308. 430 U.S. 703 (1977), *aff'g by an equally divided court* 532 F.2d 880 (3d Cir. 1976).

309. *See generally* Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161, 170-72; Note, *Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978-1979 Supreme Court Term*, 14 U. RICH. L. REV. 515, 581-83 (1980).

310. 449 U.S. 1301 (Stevens, Circuit Justice, 1980).

311. *Id.* at 1306.

312. Justice Stevens denounced the majority approach to sex discrimination questions in Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring). He later stated that the only appropriate question was whether or not persons similarly situated with reference to the law are similarly treated. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (Stevens, J., concurring).

Stewart. In *Parham v. Hughes*,[313] for example, Justice Stewart noted that invidious discrimination is proved where a statute is "premised upon overbroad generalizations and [excludes] all members of one sex even though they [are] similarly situated with members of the other sex."[314] In the absence of such "invidious discrimination," the statute only has to be rationally related to a permissible state objective in order to pass constitutional muster.[315]

This analysis would support the Seventh Circuit's conclusion in *O'Connor*, but *Parham* was only a plurality opinion. In fact, in the companion case of *Caban v. Mohammed*,[316] Justices Stewart and Stevens found themselves dissenting in a case very similar to *Parham*. Justice Stewart argued in dissent that if men and women are not in fact similarly situated in the area covered by the legislation in question, then the equal protection clause is not violated.[317] Justice Stevens went a step further, stating that if the statute was justified in its most frequent application, then a presumption of validity should arise.[318] The Stevens-Stewart analysis, which thus far has not been adopted by a majority on the Court, would permit application of a rational basis standard upon a finding that men and women were not "similarly situated." Even if plaintiffs survive this initial barrier, Justice Stevens would require them to show that its application was invidious in a sufficient number of cases to justify invalidation.[319]

The problem with this analysis is that the core of equal protection is its preservation of the right to be treated as an individual rather than

313. 441 U.S. 347 (1979).

314. *Id.* at 356-57. In *Parham*, Justice Stewart concluded that mothers and fathers of illegitimate children are not similarly situated so that a statute treating them differently did not work an invidious discrimination. *Id.* at 355. This approach was relied upon in the plurality opinion of Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 473 (1981), in upholding California's gender-based statutory rape law. In the Court's most recent sex discrimination case, Rostker v. Goldberg, 101 S. Ct. 2646 (1981), Justice Rehnquist made two troubling statements in his opinion upholding the male-only military draft registration: (1) that men and women, because of combat restrictions on women, are "not similarly situated" for purposes of a draft, and (2) that the exemption of women "is not only sufficiently but closely related to Congress' purpose in authorizing registration." *Id.* at 2658. The latter suggests that something less than a substantial relationship between means and end will be used to justify sex discrimination. However, Justice Rehnquist's emphasis on the special deference to Congress required in the area of national defense and military affairs, especially where, as here, Congress in special hearings extensively considered the question of military need, *id.* at 2651-60, should minimize the precedential weight of the opinion.

315. 441 U.S. at 357.

316. 441 U.S. 380 (1979).

317. *Id.* at 398 (Stewart, J., dissenting).

318. *Id.* at 410-12 (Stevens, J., dissenting).

319. *See* text accompanying note 310 *supra*.

as a member of a particular group.[320] The injustice is apparent in the *O'Connor* case. The whole point of the lawsuit was to demonstrate that O'Connor was not the typical sixth grade girl. The facts indicated that a professional basketball coach who had observed her play rated her ability to be equal to or better than a female high school sophomore and equal to that of a male eighth grade player.[321] The lower court had concluded that the boys' and girls' basketball teams were unequal because O'Connor's competition with girls of substantially lesser skill was not as valuable as competition with persons of equal or better skills in the boys' program.[322] The Seventh Circuit nonetheless supported its decision by reference to Title IX of the Education Amendments of 1972.[323] Although Title IX bars discrimination on the basis of sex in educational programs, the regulations promulgated under it expressly permit separate teams as well as the exclusion of girls from contact sports, including basketball.[324] Justice Stevens had also relied upon these provisions as indicating a strong probability that the gender-based classification could be adequately justified.[325] The one district court decision to strike down the regulations as unconstitutional was recently overturned by the Sixth Circuit.[326] Thus, at least for the present, it appears unlikely that claims of discrimination based on sex-segregated athletic teams involving contact sports can be successfully attacked. As to the broader question of the standard to be used in sex discrimination cases, the Seventh Circuit should reject the regressive Stevens-Stewart approach in favor of the principles enunciated in *Craig*

320. *See* TRIBE, *supra* note 4, at 1012.

321. 645 F.2d at 579.

322. *Id.*

323. 20 U.S.C. §§ 1681-1686 (1976).

324. 45 C.F.R. § 86.41 (1976). Note that lower federal courts have divided on the issue of whether females must be permitted to participate with males in contact sports. In Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975), the court held that 8- to 12-year-old girls must be allowed to play little league baseball. *See also* Carnes v. Tennessee Secondary School Athletics Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (issuing an injunction against the enforcement of a rule prohibiting high school girls from playing varsity baseball); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (granting a temporary restraining order against a rule of a Cleveland football league prohibiting girls from playing). *But see* Leffel v. Wisconsin Interscholastic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978), and Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977). Both courts struck down rules prohibiting female participation in contact sports, but noted that plaintiffs' demands for relief would be satisfied by "separate but equal" female programs. *See generally* Note, *Irrebuttable Presumption Doctrine: Applied to State and Federal Regulations Excluding Females From Contact Sports*, 4 U. DAYTON L. REV. 197, 206-08 (1979).

325. 449 U.S. 1301 (Stevens, Circuit Justice, 1980).

326. Yellow Springs v. Ohio High School Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981), *rev'g* 443 F. Supp. 753 (S.D. Ohio 1978). In *Yellow Springs*, the court relied in part on Justice Stewart's dissent in *Caban*, *see* text accompanying note 317 *supra*. 647 F.2d at 657. While refusing to fully adjudicate the constitutional issue in light of the sparse record, the court did make clear that it was reversing the district court's ruling of unconstitutionality. *Id.* at 657 n.4.

v. Boren.[327] If the court fails to do this, many of the gains made thus far in recognizing the injustice of sex discrimination will be erased.

B. Title IX: Intent Required

Another significant sex discrimination decision this term was *Cannon v. University of Chicago*.[328] In the same case, the Supreme Court had reversed an earlier Seventh Circuit ruling[329] that a private right of action does not exist under Title IX of the Education Amendments of 1972.[330] Defendants had filed renewed motions to dismiss the complaint, this time on the ground that Title IX prohibits only intentional discrimination and that the appellant had failed to allege such purposeful conduct by the defendants in her complaint.[331] The plaintiff's suit was based upon the admission policies of the Pritzker School of Medicine at the University of Chicago, which discouraged individuals over the age of thirty from applying, and Northwestern University Medical School, which flatly prohibited the admission of any applicant over the age of thirty-five who did not possess an advanced academic degree. At the time of her application, Cannon was thirty-nine years old and had no such degree. She alleged that because women historically interrupt their higher education to pursue a family and other domestic responsibilities more often than men, the age policies disparately affect women resulting in sex discrimination violative of Title IX.[332]

Relying on the Supreme Court's admonition in its earlier *Cannon* decision that Title VI[333] should provide guidance regarding the proper interpretation of Title IX, the Seventh Circuit focused its attention on recent Supreme Court decisions interpreting Title VI. Looking to statements in such recent decisions as *Regents of the University of California v. Bakke*,[334] *Fullilove v. Klutznick*[335] and *Board of Education v. Harris*,[336] the Seventh Circuit concluded that seven members of the Supreme Court, as well as many lower federal courts, now accept the view that a violation of Title VI requires intentional discrimination.[337]

327. 429 U.S. 190 (1976). *See* text accompanying note 304 *supra*.
328. 648 F.2d 1104 (7th Cir. 1981).
329. 441 U.S. 677 (1979), *rev'g* 559 F.2d 1063 (7th Cir. 1976).
330. 20 U.S.C. §§ 1681-1686 (1976).
331. 648 F.2d at 1105.
332. *Id.*
333. 42 U.S.C. §§ 2000d to 2000d-6 (1976 & Supp. III 1979).
334. 438 U.S. 265 (1978).
335. 448 U.S. 448 (1980).
336. 444 U.S. 130 (1979).
337. 648 F.2d at 1108. In addition to the Supreme Court cases cited by the Seventh Circuit,

Applying that same standard to the Title IX allegations made in Cannon's complaint, the court noted that she failed to allege that the defendant medical schools were purposefully or intentionally discriminating against her because of her sex.[338] Cannon's cause of action was based solely upon the alleged disparate impact the defendants' age policies had upon women. Relying upon Supreme Court precedent[339] under the fourteenth amendment, the court concluded that the claim of disparate impact, even when coupled with allegations that the defendants knew of this impact while enforcing their age policies, was deemed insufficient to establish a violation of Title IX.[340] The court concluded, "An illegal intent to discriminate cannot be posited solely upon a mere failure to equalize an apparent disparate impact."[341] Since the court could not infer from the plaintiff's allegations that discriminatory considerations were in any way involved in the defendants' actions, the Seventh Circuit upheld the district court's dismissal of the complaint for failure to state a claim.[342]

The *Cannon* complaint was originally filed in 1975—at a time when Title VI was still generally understood to create a cause of action for disparate impact.[343] Thus it is not surprising that the plaintiff failed to allege anything suggesting intentional discrimination. Nonetheless, the subsequent decisions in *Washington v. Davis*,[344] and especially in

see Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) (intent is an essential element under Title VI); Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) (the closing of a city hospital must be shown to have been intentionally discriminatory); Lora v. Board of Educ., 623 F.2d 248 (2d Cir. 1980) (assignment of handicapped children to special schools must be shown to be intentionally discriminatory); Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979) (Title VI should be held to impose the intentional discrimination standard, at least in school discrimination cases). *But see* NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (disparate impact, without showing intentional discrimination, is sufficient to establish a prima facie case that a federally aided medical center reorganized and relocated its facilities in violation of Title VI); De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978) (suggesting no need to show intent under Title IX), *cert. denied*, 441 U.S. 965 (1979). Note that the Supreme Court has recently granted certiorari in a case raising the intent requirement under Title VI. *See* Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 997 (1982).

338. 648 F.2d at 1109.

339. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). This case held that discriminatory purpose implies that more is required for intent than "awareness of consequences." *Id.* at 279.

340. 648 F.2d at 1110.

341. *Id.*

342. *Id.*

343. At that time the prevailing case was Lau v. Nichols, 414 U.S. 563 (1974), applying a "disparate effects" standard to find a violation of Title VI. The courts of appeals took the same approach, requiring only disparate impact. *See, e.g.*, Guadalupe Org., Inc. v. Tempe Elem. School Dist., 587 F.2d 1022, 1029 (9th Cir. 1978); Serna v. Portales Mun. Schools, 499 F.2d 1147, 1153-54 (10th Cir. 1974). Note that one court of appeals has recently held that the holding in *Lau* on disparate impact was not affected by subsequent decisions. *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1329 (3d Cir. 1981).

344. 426 U.S. 229 (1976). *Davis* established that the fourteenth amendment condemns only

Personnel Administrator v. Feeney,[345] indicate that it will be extremely difficult for plaintiffs to establish that a facially neutral policy was adopted with the purpose and intent of discriminating against a particular group. In Cannon's case, for example, even if she had been aware of the Supreme Court's subsequent decisions involving the intent requirement under Title VI and the fourteenth amendment and had alleged such, it would have been extremely difficult for her to prove that discriminatory considerations motivated the defendants' choice of their age policies.[346]

C. *Title VII: Rebutting a Prima Facie Case*

A third noteworthy sex discrimination case was decided by the Seventh Circuit this term. *Sherkow v. Wisconsin*[347] was a suit brought under the provision in Title VII of the Civil Rights Act of 1964,[348] which bars sex discrimination in employment.[349] The main question raised on appeal was whether the trial judge had correctly applied Supreme Court precedent with regard to allocation of the burden of proof. Unlike the analysis just discussed under the equal protection clause and Titles VI and IX, the mainstay of Title VII litigation is that plaintiffs can establish a prima facie case and thus avoid dismissal without proving intent. The Supreme Court in the case of *McDonnell Douglas Corp. v. Green*[350] set forth the basic elements required to establish a prima facie case in all Title VII discrimination cases.[351] As adapted to sex discrimination, the plaintiff need only establish that she is a woman; that the defendant had an employment vacancy which it intended to fill; that the plaintiff possessed the qualifications to fill the vacancy; that she applied and was rejected; and that the defendant con-

conduct motivated by a "racially discriminatory purpose." *Id.* at 240. The Court reiterated this intent requirement in Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977), and went on to list factors relevant in establishing discriminatory motive. *Id.* at 266-68.

345. 442 U.S. 256 (1979).

346. *See* Note, Personnel Administrator v. Feeney: *A Policy Decision*, 34 U. MIAMI L. REV. 343 (1980); Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376 (1979). A few lower federal courts have taken a more lenient approach to this intent requirement. In De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979), the court stated that knowing failure to revise policies, when such policies had the direct effect of hindering or excluding the protected group, raises an inference of intentional discrimination. 582 F.2d at 58. *See also* Pavey v. University of Alaska, 490 F. Supp. 1011, 1015 (D. Alaska 1980) (the combined effect of various facially neutral athletic rules could constitute discrimination in violation of Title IX).

347. 630 F.2d 498 (7th Cir. 1980).

348. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

349. *Id.* § 2000e-2.

350. 411 U.S. 792 (1973).

351. *Id.* at 802.

tinued to seek other applicants or filled the vacancy with a male applicant.[352]

Although federal courts have had little difficulty with this aspect of the *McDonnell Douglas* test, controversy has centered around the defendant's rebuttal requirement. Supreme Court precedent[353] left the courts of appeals confused as to whether the employer had to prove that its decision was based on a legitimate consideration or whether it simply had to come forth with some evidence.[354] The Seventh Circuit adopted the position that the defendant merely had to "articulate some legitimate, nondiscriminatory reason for the [plaintiff's] rejection."[355] It decided that the ultimate burden of persuasion always rested with the plaintiff and that the defendant satisfied its burden by simply going forward with evidence and explaining what it had done or by producing evidence of legitimate nondiscriminatory reasons.[356] It was then up to the plaintiff to prove that the reasons advanced were a pretext or that a motivating or substantial factor in the defendant's decision was discrimination.[357] This analysis of the burdens of proof in Title VII cases was subsequently adopted almost verbatim by the United States Supreme Court in *Texas Department of Community Affairs v. Burdine*.[358] The Supreme Court overturned the holding of the Fifth Circuit that the employer in a Title VII case had to *prove* that he hired a more qualified individual.[359] It noted that the ultimate burden of persuading a jury that the defendant intentionally discriminated against the plaintiff remained at all times with the plaintiff.[360] Thus, the prima facie case creates only a rebuttable presumption of discrimination which is countered if the defendant produces any evidence that the plaintiff was rejected for a legitimate nondiscriminatory reason. The Seventh Circuit in *Sherkow* accurately forecast the Supreme Court's position on this issue.

352. 630 F.2d at 502.

353. *E.g.*, Board of Trustees v. Sweeney, 439 U.S. 24, 25 n.2 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972).

354. 630 F.2d at 502. *See also* Texas Dep't of Community Affairs v. Burdine, 608 F.2d 563 (5th Cir. 1979), *vacated and remanded*, 450 U.S. 248 (1981), where the court imposed upon the employer the duty to prove, by objective comparative evidence, that those hired or promoted were somehow better qualified than the plaintiff. 608 F.2d at 567.

355. 630 F.2d at 502 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 802) (bracketed material in original).

356. 630 F.2d at 502.

357. *Id.*

358. 450 U.S. 248 (1981).

359. 608 F.2d 563, 567 (5th Cir. 1979).

360. 450 U.S. at 252-53. The Court specifically noted that it was the plaintiff's task to demonstrate that similarly situated employees were not treated equally. *Id.* at 258.

As applied in the *Sherkow* case before the Seventh Circuit, the court recognized that the plaintiff clearly established a prima facie case. After that the court conceded that the analysis pursued by the district court did not "follow the paradigm of the shifting burdens as we set it forth,"[361] but the court held nonetheless that the result reached in the case was a correct one.[362] The trial judge in effect had concluded that the reasons suggested by the defendant for the plaintiff's rejection were a pretext. The plaintiff had been passed over for the job of education administrator of a special educational needs program which she had helped to develop and which she had at least in part supervised. In addition, she scored higher in specially administered exams than the individual to whom the job was given and had an extensive background in the field of special education which the male appointee lacked. The defendant's rationale that the plaintiff was not as qualified as the hired individual simply did not hold up in light of the facts. The Seventh Circuit thus upheld the trial court ruling that the plaintiff had been discriminated against based on her sex and that she was entitled to the relief she sought.[363]

The same analysis of the shifting burdens of proof in Title VII litigation was followed in *Gaballah v. Johnson*.[364] Again the court noted that it is not essential that a district court follow the shifting burdens exactly and that *McDonnell Douglas* was to serve simply as a model for evaluating the evidence concerning employment discrimination.[365] In *Gaballah*, the Seventh Circuit held that the district court's dismissal of the Title VII suit at the close of the plaintiff's evidence was justified.[366] The court rejected Gaballah's contention that a showing of a prima facie case under Title VII precluded dismissal at the close of his evidence.[367] The district court was free to proceed to the remaining steps of the *McDonnell Douglas* analysis and determine from the entire record the defendant's explanations for its actions as well as the ultimate question of whether the plaintiff had shown that the defendant's reasons were a pretext, masking actual discriminatory motivation. Looking to the record as a whole, the Seventh Circuit found that the district court was justified in its conclusion that no one had discrimi-

361. 630 F.2d at 503.
362. *Id.*
363. *Id.*
364. 629 F.2d 1191 (7th Cir. 1980).
365. *Id.* at 1200.
366. *Id.* at 1201.
367. *Id.* at 1200. The Seventh Circuit had taken the same approach in Davis v. Weidner, 596 F.2d 726, 730 (7th Cir. 1979).

nated against Gaballah because of his race, national origin or religion. The findings of the district court could simply not be deemed "clearly erroneous."[368]

D. Age Discrimination in Employment Act

The Seventh Circuit decided several cases interpreting the Age Discrimination in Employment Act of 1967.[369] The ADEA prohibits employers or their agents, labor organizations and employment agencies from discriminating against employees because of age.

The court in at least one case this term dealt with burden of proof issues in age discrimination cases. There is considerable confusion as to whether Title VII standards should apply to cases arising under the ADEA.[370] A few courts of appeals have refused to borrow and automatically apply Title VII principles in age discrimination cases;[371] the Seventh Circuit, however, has joined the majority of courts which have adopted, with only slight variation, Title VII precedent on proof questions.[372] The Seventh Circuit has followed the Fifth, First and Ninth Circuits in applying the *McDonnell Douglas* standard which permits a plaintiff to establish a prima facie case of intentional discrimination by merely showing that he belongs to the group allegedly discriminated against, that he was qualified for the job he sought, that he was not hired and that the employer continued to seek applications for that position.[373]

368. 629 F.2d at 1201. FED. R. CIV. P. 52(a) requires in part that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

369. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979). Hereinafter referred to as ADEA or Act.

370. In Lorillard v. Pons, 434 U.S. 575 (1978), the Court noted that the substantive prohibitions of the ADEA were derived "in haec verba" from Title VII. *Id.* at 584. However, the Court also held that the Act was to be enforced in accordance with the procedures of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979). Applying these principles, the Court unanimously held that a jury trial is available in a private suit under the ADEA for lost wages. 434 U.S. at 585. *But see* Lehman v. Nakshian, 101 S. Ct. 2698 (1981), in which the Court found no right to a jury trial in ADEA suits brought against the federal government.

371. *See, e.g.*, Toussaint v. Ford Motor Co., 581 F.2d 812 (10th Cir. 1978); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

372. *See, e.g.*, Jackson v. Sears, Roebuck & Co., 648 F.2d 225 (5th Cir. 1981); Sutton v. Atlantic Richfield Co., 646 F.2d 407 (9th Cir. 1981); Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977); Wilson v. Sealtest Foods Div., 501 F.2d 84 (5th Cir. 1974). Note that these decisions applied the *McDonnell Douglas* test as a basis for establishing a prima facie case of age discrimination; the newer decisions also relied on recent Title VII precedent in defining the employer's rebuttal burden. *See also* Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980) (court relied on Title VII precedent to hold that a prima facie case of discriminatory impact may be established under ADEA by showing that the employer's facially neutral policy has a disparate impact upon members of a protected class), *cert. denied*, 451 U.S. 945 (1981).

373. 411 U.S. at 802.

Applying that standard to the facts before it, the Seventh Circuit in *Kephart v. Institute of Gas Technology*[374] held in a per curiam decision that the plaintiff had failed to make out a prima facie case because he had not established that he was qualified for the position he sought.[375] The court affirmed the lower court's dismissal on summary judgment and incorporated its conclusion that the plaintiff's factual allegations and proffers of proof did not present a triable issue of fact.[376]

Another ADEA issue addressed by the Seventh Circuit involved employer defenses to claims of discrimination. Once a plaintiff has established a prima facie case, the defendant, as in a Title VII case, must justify the existence of any disparities or otherwise prove that the alleged discriminatory act was privileged under one of the statutory exemptions.[377] One of the key affirmative defenses available to an employer under the ADEA, which has its counterpart in section 703(e) of Title VII,[378] is section 623(f)(1)[379] which protects employers' actions based on a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business."[380] Some courts have applied the BFOQ exemption with greater liberality to the employer in age discrimination cases than in the Title VII context.[381] The Seventh Circuit, as well as several other federal courts, has noted that liberality is especially justified when considerations of public safety are presented.[382]

374. 630 F.2d 1217 (7th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 959 (1981).

375. 630 F.2d at 1220.

376. *Id.* at 1218. The district court focused both on the plaintiff's admission that conflicts had developed between himself and his superiors and his inability to contradict the depositions of other employees stating that his work was unsatisfactory. In addition, the evidence indicated that Kephart was not displaced by persons younger than himself.

377. *See* Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Hodgson v. Earnest Mach. Prod., Inc., 479 F.2d 1133 (6th Cir. 1973). *See also* Smith & Leggette, *Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 OHIO ST. L.J. 349, 380-84 (1980).

378. 42 U.S.C. § 2000e (1976).

379. 29 U.S.C. § 623(f)(1) (1976).

380. Hereinafter referred to as BFOQ.

381. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). It is argued that age discrimination cases should be treated differently than sex discrimination cases because age considerations are more job related than sex considerations. *See* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979).

382. *See, e.g.*, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) (upholding maximum hiring age of 35 for intercity bus drivers), *cert. denied*, 419 U.S. 1122 (1975); Aldendifer v. Continental Air Lines, 19 F.E.P. Cas. 1090 (C.D. Cal. 1978) (upholding forced retirement of pilots at age 60). *See also* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-36 (5th Cir. 1976) (discussing the relevance of public safety considerations as a BFOQ); Beck v. Borough of Manheim, 505 F. Supp. 923, 925 (E.D. Pa. 1981) ("The necessary quantum of evidence to be adduced by the employer depends upon the extent and evitability of the risk of harm to which elimination of the age requirement exposes other employees and the public generally."); Tuohy v. Ford Motor Co., 490 F. Supp. 258, 264 (E.D. Mich. 1980) (holding that a jury should not be

The court followed this same trend in its recent decision in *EEOC v. City of Janesville*[383] in which a police chief was retired pursuant to the city's policy of retiring all "protective service" employees at age fifty-five. The Seventh Circuit reversed the district court's construction of BFOQ as excessively narrow. The district court held that the city failed to show that age was a BFOQ for police chiefs.[384] The Seventh Circuit decided, however, that it was sufficient that the city establish that its mandatory retirement program was justified as applied to a generic class of law enforcement personnel, rather than focusing on the specific duties and requirements of a police chief.[385] The court found that the city had sustained its burden through its reliance on Wisconsin's Public Employees' Retirement Act which uses an age fifty-five limit for all protective service employees as "in the best interest of all public safety personnel and the people they are required to serve."[386] The city had acted on a good faith belief that public safety required early retirement of all protective service employees and was not required to address the specific question of whether age was a bona fide occupational qualification for a police chief.

The Seventh Circuit adopted this restrictive approach despite the fact that recent amendments intended to strengthen the ADEA[387] and commentary on the new provisions suggest that employers should be called upon to make a showing of greater justification for any age BFOQ.[388] Other circuits appear to have imposed a heavier burden on employers, requiring them to show (1) that the BFOQ is reasonably necessary to the essence of their business, and (2) that there is a factual basis for believing that all or substantially all precluded persons would be unable to perform the required tasks safely and efficiently or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.[389] Illustrative of this stricter approach is the

permitted to speculate on sufficiency of medical evidence where the claimed BFOQ involved important safety interests). *See generally* Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 407 (1976), which notes the special importance of the safety factor in judging ADEA claims.

383. 630 F.2d 1254 (7th Cir. 1980).

384. 480 F. Supp. 1375, 1380 (W.D. Wis. 1979).

385. 630 F.2d at 1258.

386. *Id.* at 1258-59.

387. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

388. *See generally* Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979). Congress' intent that BFOQ be very narrowly construed and thus applicable in few cases is also reflected in the regulations. *See, e.g.*, 29 C.F.R. § 860.102 (1980).

389. *See, e.g.*, Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); Usery v. Tamiami

Eighth Circuit opinion in *Houghton v. McDonnell Douglas Corp.*,[390] rejecting a BFOQ defense to the forced retirement of a test pilot at age fifty-two because the employer had not presented any concrete factual evidence that substantially all older pilots are unable to perform their duties safely and efficiently.[391]

Although public safety factors are obviously involved in the position of police chief, a simple assertion of public safety required for protective service employees should not be sufficient to dismiss an ADEA claim. The city in *Janesville* should have been required to present concrete evidence, as was required in *Houghton*, to support age as a BFOQ for police chiefs. A change in the position of the Seventh Circuit on this issue is long overdue.

In addition to the BFOQ defense, the original Act also provided an exception for both bona fide seniority systems and bona fide employee benefit plans.[392] The latter exception was one of the most heavily litigated portions of the Act during its first decade.[393] Although under the 1978 amendments to the ADEA[394] an employer will no longer be able to retire an employee under the terms of an employee benefit plan before the employee reaches the upper limits of the age protection, the amendments have generally been held not to be retroactive.[395] Thus, the Seventh Circuit was faced this term with three cases involving interpretation of the pre-1978 bona fide employee benefit

Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976). *See also* EEOC v. City of St. Paul, 500 F. Supp. 1135, 1144-45 (D. Minn. 1980) (evidence established that 65 age limit was a reasonable requirement for captains and firefighters, but there was no factual basis for believing that substantially all district fire chiefs are unable to perform their duties safely and efficiently after age 64); Aaron v. Davis, 414 F. Supp. 453, 463 (E.D. Ark. 1976) (the record failed to show the special relevance of the mandatory retirement age of 62 for district fire chiefs; therefore, the ordinance was wholly lacking in any justifiable business necessity).

390. 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

391. 553 F.2d at 564.

392. 29 U.S.C. § 623(f)(2) (1976) (amended 1978). Prior to its amendment, *see* note 394 *infra*, the exception provided:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> . . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual; . . . .

29 U.S.C. § 623(f)(2) (1976).

393. *See, e.g.*, cases cited note 397 *infra*.

394. The Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, amended 29 U.S.C. § 623(f)(2) to read in part as follows:

> [N]o such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual; . . . .

395. The weight of federal case law is that the amendment is to be given prospective application. *See* cases cited in Smart v. Porter Paint Co., 630 F.2d 490, 497 (7th Cir. 1980). The effect of

plan exemption.[396]

The Seventh Circuit, as well as other courts of appeals, had earlier held that these seniority and benefit exceptions of the ADEA could be used to insulate a pension plan where the employer had the option to retire an employee, even though this was not mandatory for all employees.[397] The Seventh Circuit reaffirmed that conclusion in *Gonsalves v. Caterpillar Tractor Co.*,[398] holding that it was irrelevant that the early retirement plan was optional since the employee did know the date at which he *might* be retired.[399] Thus, the plan was immunized under the employee benefits exception. The Seventh Circuit refused, however, to extend the exception to cases where the retirement benefit plan did not explicitly provide that the employer had the right to retire an employee before normal retirement age. In *Sexton v. Beatrice Foods Co.*,[400] the plan did not expressly provide for involuntary retirement, although it did permit the employee to elect early retirement. The Seventh Circuit held that the employer did not observe the terms of a bona fide pension plan within the meaning of the Act, and it rejected the district court's reliance on the common law right of an employer to terminate its employees coupled with the provision in the plan for voluntary retirement as a basis for upholding the employer's actions.[401]

In *Smart v. Porter Paint Co.*,[402] the Seventh Circuit also vacated a summary judgment entered by the district court in the case of a plan which was amended in 1976 to lower the retirement age from sixty-five to sixty. The Supreme Court in *United Air Lines, Inc. v. McMann*[403] had held that it was not necessary for an employer to show a business or economic purpose to rely on the employee benefits exception with regard to plans adopted *before* the 1967 Act.[404] The Seventh Circuit in *Smart* held, however, that plans or amendments adopted *after* 1967 do

the 1978 amendments is to overrule the Supreme Court's decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977). *McMann* is discussed in text accompanying note 403 *infra*.

396. Gonsalves v. Caterpillar Tractor Co., 634 F.2d 1065 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981); Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980); Sexton v. Beatrice Foods Co., 630 F.2d 478 (7th Cir. 1980).

397. Minton v. Whirlpool Corp., 569 F.2d 1012 (7th Cir. 1978). *See also* Marshall v. Hawaiian Tel. Co., 575 F.2d 763 (9th Cir. 1978); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978).

398. 634 F.2d 1065 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

399. 634 F.2d at 1067.

400. 630 F.2d 478 (7th Cir. 1980).

401. *Id.* at 484-85. The same conclusion was reached in EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107, 1110-11 (4th Cir. 1980), where the court required explicit language in a plan indicating a company prerogative to retire employees involuntarily.

402. 630 F.2d 490 (7th Cir. 1980).

403. 434 U.S. 192 (1977).

404. *Id.* at 203.

require an employer to state some nondiscriminatory motivation in order to avail itself of the exemption by means of summary judgment.[405] The court correctly reasoned that in order to evaluate whether a post-ADEA plan was a "subterfuge" to evade the Act,[406] some evidence of the plan's purpose had to be presented.[407] The court cited other lower court decisions which have similarly required evidence of "clear and direct business purpose" in order to grant the defendant summary judgment.[408] Since no evidence of motive or purpose was presented to justify the employer's 1976 amendment to its plan, the district court order granting summary judgment was vacated.[409]

VI. ENFORCEMENT OF CIVIL RIGHTS

Civil rights and civil liberties are obviously of little value unless they can be enforced. While in some situations there may be other methods of enforcement, *e.g.*, administrative remedies, the availability of a judicial remedy is critical. Even where rights exist, there can be technical and practical impediments to judicial enforcement of the rights. Numerous judicial doctrines have been developed or expanded in recent years which make access to the federal judiciary more difficult. Some examples of these doctrines include standing, exhaustion, abstention, comity, federalism and limitations on situations where a remedy will be implied. An important practical deterrent, the cost of litigation, has been removed to some extent through the Civil Rights Attorney's Fees Awards Act of 1976.[410] Several of the decisions of the Seventh Circuit during this term touched upon one or more of these subjects and these will be explored in this section under three categories: right of action, limitations on relief and attorney's fees.

405. 630 F.2d at 495. Contrast this approach to bona fide pension plans under the ADEA with the Supreme Court's recent refusal to distinguish between pre- and post-Title VII seniority systems in assessing Title VII violations. *See* American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364 (U.S. Apr. 5, 1982). The Court reasoned that the plain language of Title VII, as well as its legislative history, indicates Title VII's protection of all bona fide seniority practices. Therefore, even a post-Title VII seniority system which locks in past discrimination is protected unless it is accompanied by discriminatory purpose.

406. Note that the exemptions protect only plans which are not "a subterfuge to evade the purposes of [the Act.]" 29 U.S.C. § 623(f)(2) (1976 & Supp. III 1979).

407. 630 F.2d at 495.

408. *Id.* at 496. *See, e.g.*, EEOC v. Baltimore & Ohio R.R., 632 F.2d 1107, 1112-13 (4th Cir. 1980) (holding that the defendant's 1972 amendments to its plan were "a subterfuge to evade the purposes" of the ADEA).

409. 630 F.2d at 497.

410. 42 U.S.C. § 1988 (1976) (amended 1980).

A. Right of Action

At least since *Monroe v. Pape*,[411] civil rights litigants have relied upon section 1983[412] as the principal source of a cause of action for suits against nonfederal governmental officials and persons acting in concert with governmental officials.[413] Since *Monroe*, section 1983 has been both expanded and contracted by the Supreme Court. For example, *Monroe* held that a municipality was not a "person" and therefore could not be sued under section 1983.[414] Subsequently, in *Monell v. New York City Department of Social Services*,[415] the Court reversed this aspect of *Monroe*[416] and in *Owen v. City of Independence*[417] the Court held that municipalities not only could be sued under section 1983, but that they could not assert the good faith of their officials as a defense to an action for compensatory damages.[418] Most recently, in *City of Newport v. Fact Concerts, Inc.*,[419] the Court further refined *Owen* by holding that a municipality could not be subject to liability for punitive damages under section 1983 based on the bad faith actions of its officials.[420]

After reserving the question for many years, finally, in *Maine v. Thiboutot*,[421] the Court expressly held that section 1983 could be used as a vehicle for enforcing federal statutory rights.[422] The words "and laws" were given their apparent meaning. The Supreme Court subsequently put some restrictions on *Thiboutot*. First, in *Pennhurst State School & Hospital v. Halderman*,[423] the Court suggested that section 1983 might not provide a cause of action in all situations where a plaintiff was attempting to enforce federal statutory rights.[424] This sugges-

411. 365 U.S. 167 (1961).
412. 42 U.S.C. § 1983 (Supp. III 1979). Section 1983 provides in pertinent part:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

413. Justice Powell recently stated that it "has burst its historical bounds." Parratt v. Taylor, 451 U.S. 527, 554 (1981) (Powell, J., concurring).
414. 365 U.S. at 191.
415. 436 U.S. 658 (1978).
416. *Id.* at 701.
417. 445 U.S. 622 (1980).
418. *Id.* at 650.
419. 101 S. Ct. 2748 (1981).
420. *Id.* at 2762.
421. 448 U.S. 1 (1980).
422. *Id.* at 4.
423. 451 U.S. 1 (1981).
424. *Id.* at 28.

tion became reality a few months later when, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*,[425] the Court went out of its way[426] to decide that section 1983 could not be used where Congress intended the remedy provided under a statute to be the sole remedy.[427] Determining the intent of Congress when it has not been expressly indicated can, of course, be difficult.

The holding in *National Sea Clammers* makes the determination of whether Congress, absent express language, intended or implied a cause of action or remedy under a statute even more critical.[428] Where a statute provides substantive rights, there are several possibilities. Congress may expressly provide the full range of remedies, including attorney's fees,[429] it may provide for express remedies but limit them to those which are equitable in nature,[430] or it may be silent as to both cause of action and remedy, in which case the courts must face the question of whether either or both should be implied. Whenever Congress does not expressly deal with cause of action or remedy, *National Sea Clammers* is important because in it the Court seems to have collapsed the four-part test first outlined in *Cort v. Ash*[431] into a determination of "whether Congress intended to create a private right of action."[432] But, as Justice Stevens noted, "legislative history is unlikely

425. 101 S. Ct. 2615 (1981).

426. Neither party raised the issue in the Supreme Court; the plaintiff did not assert a claim under § 1983 and the lower courts did not decide the issue.

427. 101 S. Ct. at 2627.

428. This is true because if § 1983 is available in every suit against state or local officials to enforce federal statutory rights, then the question of congressional intent can often be avoided. Of course, if the statute does not provide any substantive rights, it is not important whether Congress intended a cause of action. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28 n.21 (1981).

429. In this case it would make little difference whether or not § 1983 is also available.

430. Here the availability of § 1983 becomes important as a basis for awarding damages and fees under § 1988. After *National Sea Clammers*, a strong argument could be made that Congress, having explicitly dealt with the remedy, intended it to be exclusive absent an indication that other remedies would also be available. Justice Stevens argued in dissent that both statutes involved "expressly preserve all legal remedies otherwise available." 101 S. Ct. at 2631 (Stevens, J., concurring in part and dissenting in part). *Cf.* 33 U.S.C. § 1365(e) (1976) (citizen suits under Federal Water Pollution Control Act); 33 U.S.C. § 1415(g)(5) (1976) (civil suits by private persons under Marine Protection, Research, and Sanctuaries Act of 1972).

431. 422 U.S. 66 (1975). The Court articulated the four factors as follows:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original; citations omitted).

432. 101 S. Ct. at 2622.

to reveal affirmative evidence of a congressional intent to authorize a specific procedure that the statute itself fails to mention."[433]

Similarly, absent explicit language in the statute, "legislative history is unlikely to reveal affirmative evidence of a congressional intent" to retain section 1983 remedies.[434] Therefore it is important that *National Sea Clammers* be read to eliminate section 1983 as a vehicle to enforce federal statutory rights only in situations where there is some clear indication of a "congressional intent to preclude the remedy of suits under § 1983."[435] The language quoted above and the fact that *Thiboutot* was not overruled supports such a reading of *National Sea Clammers*.

Several cases were decided by the Seventh Circuit this term addressing the question of whether a right of action could be implied under a federal statute. Two such cases involved the Rehabilitation Act of 1973.[436] In *Simpson v. Reynolds Metals Co.*,[437] the court, relying primarily on *Lloyd v. Regional Transportation Authority*,[438] held that a cause of action could be implied under section 504 of the Rehabilitation Act of 1973[439] because the Veterans Administration, the agency providing federal funds for an apprenticeship program, had not issued final regulations implementing section 504.[440] However, the plaintiff employee in *Simpson*, who claimed a handicap based on chronic alcoholism, did not have standing because the only federal dollars utilized by the defendant private employer were from the Veterans Administration and the plaintiff was not a veteran.[441] In other words, he was not "otherwise eligible" to participate in the apprenticeship program.[442]

433. *Id.* at 2629 (Stevens, J., concurring in part and dissenting in part).

434. *Id.*

435. *Id.* at 2626.

436. 29 U.S.C. §§ 701-796i (1976 & Supp. III 1979).

437. 629 F.2d 1226 (7th Cir. 1980).

438. 548 F.2d 1277 (7th Cir. 1977). In *Lloyd*, the court found the lack of regulations important because it left the plaintiffs without a meaningful administrative enforcement scheme. *Id.* at 1286.

439. 29 U.S.C. § 794 (1976), *as amended by* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, tit. I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987. Section 504 provides in part:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

440. 629 F.2d at 1230.

441. *Id.* at 1231.

442. Absent a "nexus between [Simpson's] discharge and the federal assistance," *id.* at 1232,

The plaintiff also asserted a claim under section 503(a) of the Act.[443] However, the court rejected this on the grounds that there was not an implied right of action.[444] The key to the court's analysis seems to be the lack of "duty-creating language" in section 503(a) as opposed to the language Congress used in section 504.[445] The court's careful analysis of each of the four factors identified in *Cort* is probably not required in light of the most recent decisions of the Supreme Court.[446]

In another case, *Adashunas v. Negley*,[447] the court summarily approved the lower court's holding that the "Rehabilitation Act does provide the handicapped with affirmative rights, does create a private right of action and does not require exhaustion of administrative remedies."[448] The plaintiff in *Adashunas*, who was challenging the adequacy of his special education program, also asserted a claim for damages under section 1983. However, the lower court did not address the question of whether it could be used to enforce section 504.

Finally, in *Davis v. Ball Memorial Hospital Association*,[449] a case involving the Hill-Burton Act,[450] the court held that the plaintiffs did not have an implied right of action under the Act to sue the Secretary of HEW.[451] This was based primarily on the fact that Congress had amended the Act to provide expressly for private suits against the medical facilities, but in doing so did not provide for suits against the Secretary. As noted by the Court,

> Congress apparently chose to create an enforceable interest in indigent patients insofar as compliance by the facilities is concerned. . . . It is one thing to make the patients the direct beneficiaries of the assurances, quite another to give them an immediate interest in the particulars of federal enforcement and administration, which serve the public at large. Put more simply, the interests implicated by an action to compel local compliance with the assurances are different from those implicated by a suit to compel

the court was unwilling to extend the protection of § 504 to all employees, whether or not they were "the intended beneficiaries of the federal financial assistance in question." *Id.* at 1234.

443. 29 U.S.C. § 793(a) (1976 & Supp. III 1979).

444. 629 F.2d at 1237.

445. *Id.* at 1240. This is consistent with Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

446. *See* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 101 S. Ct. 2615 (1981), and cases cited *id.* at 2627 n.1 (Stevens, J., concurring in part and dissenting in part).

447. 626 F.2d 600 (7th Cir. 1980).

448. *Id.* at 603. The primary issue in this case was whether the plaintiff could represent a class of students with learning disabilities throughout the state of Indiana. Because of a perceived difficulty in identifying the class members, the court affirmed the lower court's refusal to certify a plaintiff class. *Id.* at 603-04.

449. 640 F.2d 30 (7th Cir. 1980). *See also* notes 215-34 *supra* and accompanying text.

450. 42 U.S.C. §§ 291 to 291o-1 (1976 & Supp. III 1979).

451. 640 F.2d at 44-46.

specific action by the Secretary to compel the facilities to comply.[452]

Even assuming the court is correct in its holding in *Davis* that there is no implied right of action against the Secretary, the disturbing aspect of the case is the court's refusal to allow the plaintiffs to proceed against the Secretary under the Administrative Procedure Act.[453] The plaintiffs had not pleaded or argued the APA issue in the lower court and the Seventh Circuit would not allow it at the appellate stage, treating it as an attempt to "alter the entire theory of their action with a mere wave of the hand."[454] This aspect of the case seems to be clearly wrong. First, the APA does provide for a cause of action in such a case against a federal official. Second, changing the basis for a cause of action certainly does not "alter the entire theory" of a case, particularly since there is no rigid requirement to plead the source of a cause of action. Third, the court's reference to the plaintiffs' "glib treatment of the jurisdictional basis of a particular lawsuit"[455] misses the mark because no one contends that the APA itself provides for jurisdiction. Jurisdiction would be provided under 28 U.S.C. § 1331.[456]

Even when a plaintiff can use section 1983 and not worry about whether a right of action is implied under a statute, there is still a question of whether the facts are sufficient to state a claim. A number of decisions in the Seventh Circuit this term dealt with the sufficiency of allegations in section 1983 actions.

In *Tarkowski v. Robert Bartlett Realty Co.*,[457] a *pro se* plaintiff al-

452. *Id.* at 45. Here again, the rigid inquiry into each of the four *Cort* factors is probably outmoded after *National Sea Clammers*. *See* notes 431-35 *supra* and accompanying text.

453. 5 U.S.C. § 702 (1976). Hereinafter referred to as APA. The APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that [*sic*] money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

454. 640 F.2d at 47.

455. *Id.*

456. 28 U.S.C. § 1331 (1976). Even if it were considered jurisdictional, the holding is wrong because 28 U.S.C. § 1653 (1976) provides that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

457. 644 F.2d 1204 (7th Cir. 1980).

leged a conspiracy between a private party and the state's attorney relating to discriminatory enforcement of zoning ordinances. After a discussion of how *pro se* pleadings should be liberally interpreted[458] and a recognition that private parties can be liable under section 1983 when "jointly engaged" with public officials,[459] the court concluded that the most recent amended complaint simply did not include facts sufficient to establish a conspiracy: "Mere conjecture that there has been a conspiracy is not enough to state a claim. A private person does not conspire with a state official merely by invoking an exercise of the state official's authority."[460] The court was obviously looking for a "factual basis suggesting the meeting of minds" rather than conclusory allegations.[461]

Another conspiracy-type claim was asserted in *Brucar v. Rubin*.[462] The plaintiffs brought a section 1983 action against the petitioning party in a state court guardianship proceeding and her two attorneys claiming they conspired with a state court judge to deprive the plaintiffs of due process. The plaintiffs contended that, because the defendants had invoked the power of the state court, the defendants acted under color of state law within the meaning of section 1983. The court distinguished its earlier decision in *Sparkman v. McFarlin*[463] in holding that the complaint sufficiently alleged a conspiracy. Noting that even a strict pleading requirement does not require proof, the court stated,

> [A] fact finder could reasonably conclude on the basis of the Brucars' allegations, "not only that the private party used the state court proceedings to produce a constitutional wrong, but that there was agreement between the party and judge beyond ordinary request and persuasion by the prevailing party, and that the state court judge invidiously used his office to deprive the § 1983 plaintiff of a federally protected right."[464]

The sufficiency of allegations for claims under the eighth amendment was considered in two prison cases. In *Chavis v. Rowe*,[465] the plaintiff alleged overcrowding—confinement to a five-foot by seven-

458. *Id.* at 1207.
459. *Id.* at 1206.
460. *Id.* at 1208.
461. *Id.*
462. 638 F.2d 987 (7th Cir. 1980) (per curiam).
463. 601 F.2d 261 (7th Cir. 1979). According to *Brucar*, the decision in *McFarlin* had added "strict pleading requirements to the *Adickes* rule where the 'joint activity' is between private individuals and a state court official." 638 F.2d at 993 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)).
464. 638 F.2d at 993-94 (quoting Sparkman v. McFarlin, 601 F.2d 261, 262 (7th Cir. 1979) (Fairchild, C.J., concurring)).
465. 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981).

foot cell along with four other residents—and "inadequate bedding, light, toilet facilities, showers, access to legal materials, medical and dental care and food."[466] These conditions existed during a six-month period of confinement in segregation. The court concluded that the allegations met the test for an eighth amendment violation set forth in *Stringer v. Rowe*.[467] Under this test a plaintiff must "show that prison officials intentionally inflicted excessive or grossly severe punishment on him or that the officials knowingly maintained conditions so harsh as to shock the general conscience."[468] It should be noted that *Chavis* was decided before *Rhodes v. Chapman*[469] in which the Supreme Court for the first time "considered a disputed contention that the conditions of confinement at a particular prison constituted cruel and unusual punishment"[470] and held that the "discomforts" of double-celling do not constitute cruel and unusual punishment.[471]

Duncan v. Duckworth[472] involved a claim for damages under the eighth amendment based on an alleged extensive delay in providing surgery to a prison inmate after the need for it was recognized. The court referred to the "deliberate indifference" test from *Estelle v. Gamble*[473] and concluded that the facts alleged at least gave rise to "an inference of such indifference."[474]

Both *Duncan* and *Chavis* dealt with the liability of upper-level prison administrators in the context of section 1983 actions. In *Duncan*, the lower court, relying on *Adams v. Pate*,[475] had dismissed the claim for damages because the complaint failed to allege that the defendants "personally participated in the alleged misconduct."[476] While reaffirming that personal knowledge or involvement must be established in order for liability to arise under section 1983, the court found that the lower court had erred in treating this "general principle of recovery under § 1983 as a strict rule of pleading."[477] Referring then to the lower court's dismissal of the prison hospital administrator as a defendant, the court noted that as administrator he had a responsibility for

466. 643 F.2d at 1290.
467. 616 F.2d 993, 998 (7th Cir. 1980).
468. 643 F.2d at 1291.
469. 101 S. Ct. 2392 (1981).
470. *Id.* at 2398.
471. *Id.* at 2399.
472. 644 F.2d 653 (7th Cir. 1981).
473. 429 U.S. 97, 104 (1976).
474. 644 F.2d at 654.
475. 445 F.2d 105 (7th Cir. 1971).
476. 644 F.2d at 655.
477. *Id.*

insuring that prison inmates receive adequate medical care and that "[t]his responsibility is a sufficient basis from which to infer his personal involvement in the denial of such care at the pleading stage of the proceeding."[478]

Similarly, in *Chavis*, the court noted that direct responsibility for conditions of segregation imposed on the plaintiff "must have rested on an official at a relatively high administrative level."[479] In both cases the court went on to indicate that if the high-level officials denied knowledge and responsibility, they would be in a better position than the plaintiff to identify those who did bear responsibility.[480] This is significant because it appears to shift the burden of identifying the responsible party to the high-level official who denies involvement or responsibility.

The court recognized these cases as somewhat of a departure from a strict application of *Adams v. Pate* but believed it was justified by the nature of the claims:

> Both cases involve claims relating to conditions or practices which, if they in fact do exist, would very likely be known to, or acquiesced in, by officials at a relatively high administrative level. At the same time, the conditions or practices upon which the claims are based may be of such a kind that the claimant will have had no personal contact with, or knowledge of, the person directly responsible.[481]

In taking this approach, the court referred to an earlier case in which it had indicated that a plaintiff who cannot initially identify the persons he claims caused injury should be allowed to sue them under fictitious names and, instead of dismissing such a complaint, the lower court should order the disclosure of the names or permit such a plaintiff to conduct discovery.[482] While it should be noted that several of the section 1983 cases dealing with the sufficiency of the pleadings involved

478. *Id.* The court did not have to confront the question of what the plaintiff had to ultimately prove. Under some circumstances failure to supervise can give rise to liability. *See, e.g.*, Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981); Withers v. Levine, 615 F.2d 158 (4th Cir.), *cert. denied*, 449 U.S. 849 (1980); Sims v. Adams, 537 F.2d 829 (5th Cir. 1976); Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979); Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979); Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979).

479. 643 F.2d at 1290 n.9. *See also* Murray v. City of Chicago, 634 F.2d 365 (7th Cir. 1980), *cert. granted sub nom.* Finley v. Murray, 102 S. Ct. 501 (1981), a suit against the city, high-level police officials and arresting officers, in which the plaintiff alleged an arrest pursuant to an invalid warrant and a strip search. A dismissal was overturned on the grounds that the plaintiff was entitled to an opportunity to prove her allegation that "similar unwarranted arrests have occurred frequently, to the knowledge of the parties involved." 634 F.2d at 367. Such proof might show a dereliction of duty of constitutional dimension.

480. 644 F.2d at 656; 643 F.2d at 1290 n.9.

481. 644 F.2d at 656.

482. *See* Maclin v. Paulson, 627 F.2d 83, 87 (7th Cir. 1980).

pro se complaints,[483] the principles announced are not necessarily limited to such pleadings.

Even if the plaintiff gets beyond the cause of action hurdle, there are other potential barriers to relief in civil rights actions. These will be discussed in the following section.

B. Limitations on Relief

Probably the most serious limitations or restrictions on relief in civil rights cases are those imposed by the ever-expanding notions of comity and federalism.[484] The Seventh Circuit did not deal extensively with these concepts, however, during the 1980-81 term.[485] Another serious limitation on relief in civil rights cases which the Seventh Circuit did address this term is public officials' immunity to damages in section 1983 cases.[486] The Supreme Court has, in *Gomez v. Toledo*,[487] for the

483. *E.g.*, Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981); Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981); Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204 (7th Cir. 1980); Maclin v. Paulson, 627 F.2d 83 (7th Cir. 1980). *See also* Muhammad v. Rowe, 638 F.2d 693 (7th Cir. 1981), in which the court overturned the granting of a motion to dismiss and summary judgment against a prison inmate, indicating that the *pro se* litigant was not only denied the appointment of counsel "but also was not informed that he could answer documents filed in support of the defendants' motion for summary judgment with his own documents, including affidavits." *Id.* at 696. Jones v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980), *see* note 518 *infra*, also concerned a refusal to appoint counsel. *But see* Zaun v. Dobbin, 628 F.2d 990 (7th Cir. 1980) (dismissal of a *pro se* complaint for failure to comply with a local rule requiring the use of a standardized financial affidavit in seeking to proceed *in forma pauperis* was affirmed).

484. On the Supreme Court level, these concepts were given new life in Younger v. Harris, 401 U.S. 37 (1971), and have grown continually through a series of subsequent decisions. *See* Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

485. In one case, Schleiffer v. Meyers, 644 F.2d 656 (7th Cir. 1981), the court held that *Younger* principles were no bar to a federal court action challenging the constitutionality of an Indiana state court child custody decree; however, the plaintiff was unable to overcome the obstacles imposed by the Anti-Injunction Act, 28 U.S.C. § 2283 (1976). In another decision, Dommer v. Crawford, 638 F.2d 1031 (7th Cir. 1980), the court held that a district court had gone too far in projecting the federal court into the daily operation of the state criminal justice system. This was based primarily on Rizzo v. Goode, 423 U.S. 362 (1976), a case with definite comity and federalism overtones. The original opinion in *Dommer* was withdrawn after a petition for rehearing was filed and was superseded by an opinion issued on July 7, 1981. *See* 653 F.2d 289 (7th Cir. 1981) (per curiam). The second opinion upheld the relief which required the defendants to bring persons arrested and charged with a state criminal offense before a magistrate for an initial court appearance within 24 hours of their arrest. However, the relief was reversed insofar as it applied to a prosecuting attorney who took office after the facts complained of and who was not proved to be responsible for the illegal conduct. *Rizzo*-type concerns were also expressed in Murray v. City of Chicago, 634 F.2d 365, 367 n.4 (7th Cir. 1980), *cert. granted sub nom.* Finley v. Murray, 102 S. Ct. 501 (1981).

486. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978); Stump v. Sparkman, 435 U.S. 349 (1978); Procunier v. Navarette, 434 U.S. 555 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

487. 446 U.S. 635 (1980).

first time made it clear that a qualified immunity from damages must be asserted by the defendant as an affirmative defense.[488] The Court, however, dealt only with the burden of pleading, not the burden of proof. While the burden of proof normally follows the burden of pleading, it is not automatic. Thus, the Seventh Circuit holding in *Chavis v. Rowe*[489] that the defendants must "*prove* that they acted in good faith before they are granted qualified immunity"[490] is of some significance.

Three Seventh Circuit cases dealt with the tough question of whether a qualified immunity was available.[491] In *Hayes v. Thompson*,[492] the court found that while the due process rights of the plaintiff had been violated by the prison disciplinary committee's denial of the plaintiff's request for witnesses and an inadequate statement of reasons given for disciplinary action, it could not overturn the lower court finding of good faith as clearly erroneous.[493] The key factor in the court's decision seems to have been that the prison officials made some effort to comply with the requirements of *Wolff v. McDonnell*.[494] Judge Swygert dissented from this part of the decision, noting that the lower court had adopted the defendant's proposed findings "wholesale" and therefore should have been subjected to a more critical review even though the "clearly erroneous" standard would still apply.[495] According to Judge Swygert, the majority's decision "encourages official ignorance of the law" and it should be no defense to suggest, as the defendants did at trial, "that no one had explained *Wolff* to them."[496]

In *Wood v. Strickland*,[497] the Supreme Court, in the school discipline context, set forth a three-prong test for determining when public officials can be deprived of their immunity from liability for damages. First, the constitutional right allegedly violated must have been clearly

488. *Id.* at 640.

489. 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981).

490. 643 F.2d at 1288 (emphasis added). *See also* Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1980), *cert. granted sub nom.* Finley v. Murray, 102 S. Ct. 501 (1981) (defendant officers must "plead and prove" their entitlement to a qualified immunity).

491. Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 U.S. 415 (1981); Hayes v. Thompson, 637 F.2d 483 (7th Cir. 1980); Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980).

492. 637 F.2d 483 (7th Cir. 1980).

493. *Id.* at 491.

494. 418 U.S. 539 (1974).

495. 637 F.2d at 495 n.4 (Swygert, J., concurring in part and dissenting in part). The majority, while it agreed that the review would be more critical in this situation, still upheld the lower court. *Id.* at 490.

496. *Id.* at 495 (Swygert, J., concurring in part and dissenting in part).

497. 420 U.S. 308 (1975).

established at the time of the challenged conduct. Second, the defendants must have known of that right. Finally, the defendants knew or should have known that their conduct would violate that right.[498] This test was applied by the Court to prison officials in *Procunier v. Navarette*.[499] Also in the prison discipline context, the Seventh Circuit in *Chavis v. Rowe*[500] examined each of the three prongs and concluded that the defendants had not established their entitlement to a qualified immunity with respect to one of the plaintiff's due process claims—failure to provide a written statement of the reasons for the disciplinary action and the evidence relied on.[501] Such a statement was required by both the Supreme Court[502] and earlier decisions of the Seventh Circuit,[503] so the right was clearly established.[504] It was easy to conclude that the defendants knew or should have known of this right because it was incorporated into department regulations promulgated after the Supreme Court decision. Finally, the case was distinguished from *Hayes* because it was clear that the meager statement provided by the defendants did not satisfy the constitutional norm and they should have known this. As to another due process claim, the defendants' failure to inform the plaintiff of certain exculpatory evidence, the court reluctantly held that the defendants, on remand, must be given an opportunity to prove that they acted in good faith.[505]

Even assuming lawyers and judges can agree on a test for determining whether a qualified immunity exists, it is not easy to communicate the standard to a jury. In *Mary and Crystal v. Ramsden*,[506] the court approved the following jury instruction:

> In considering whether a particular defendant acted in good faith belief that his or her acts were lawful, you must consider two factors. First, you should consider whether the defendant has asserted his or her belief that the acts were lawful. And second, you must consider whether the defendant was reasonable in this belief. First, whether the defendant did believe that the acts were lawful and second,

498. *Id.* at 322.
499. 434 U.S. 555, 562 (1978).
500. 643 F.2d 1281 (7th Cir.), *cert. denied*, 102 S. Ct. 415 (1981).
501. 643 F.2d at 1288-89.
502. Wolff v. McDonnell, 418 U.S. 539 (1974).
503. Hayes v. Walker, 555 F.2d 625 (7th Cir.), *cert. denied*, 434 U.S. 959 (1977); Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947, *reinstated as modified*, 547 F.2d 372 (7th Cir. 1976).
504. *But cf.* Lock v. Jenkins, 641 F.2d 488, 498-500 (7th Cir. 1981), in which the court found that the law relating to the use of tear gas in prisons and the conditions in confinement for pretrial detainees was not so clearly established in 1975 as to preclude a reasonable belief that the plaintiffs' constitutional rights were not being violated.
505. 643 F.2d at 1288.
506. 635 F.2d 590 (7th Cir. 1980).

whether that belief on the part of the defendant was reasonable.[507] The court also held that a member of the correctional staff, who served as part of a committee which imposed discipline, was performing a function "more similar to that of the school board members in *Wood v. Strickland* . . . than to that of a judge."[508] Therefore, she was entitled to only a qualified immunity. This demonstrates the functional approach to immunity determinations, *i.e.*, looking beyond the official's title to an examination of what is actually being done by the official and inquiring into whether the policy reasons supporting qualified immunity apply to the situation.[509]

Assuming a section 1983 plaintiff gets beyond an immunity defense, the test for damages becomes critical. The Seventh Circuit decided a case which is quite helpful in understanding the scope of damages, both compensatory and punitive, in an action under section 1983. In *Busche v. Burkee*,[510] the plaintiff had been unlawfully terminated from his position as a police officer and the lower court awarded him $10,000 in compensatory damages and $2,000 in punitive damages against the mayor of Kenosha. The court first held that federal, rather than state, common law governs the determination of damages under section 1983 and that the law "must be fashioned to promote the purposes underlying the enactment of § 1983."[511] It also noted that the amount of damages necessary to compensate a plaintiff is a factual matter to be upset on appeal only if clearly erroneous.[512] While the award here was based solely on intangible losses, *i.e.*, damage to reputation and emotional distress, the court could not "say that the evidence of Busche's emotional distress and damaged reputation was insufficient to sustain the district court's finding that an award of $10,000 was necessary to properly compensate him for the deprivation of his due process rights."[513] Recognizing that the injuries and the determination of amount of damage are "subjective," the court nevertheless found that the amount was supported by sufficient competent evidence.[514] This is true even though the only supporting evidence was the testimony of the plaintiff rather than that of medical or psychiatric experts.

507. *Id.* at 598.
508. *Id.* at 600 (citation omitted).
509. *See also* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980); Butz v. Economou, 438 U.S. 478 (1978).
510. 649 F.2d 509 (7th Cir.), *cert. denied*, 102 S. Ct. 396 (1981).
511. 649 F.2d at 518.
512. *Id.*
513. *Id.* at 519.
514. *Id.* at 519-20.

Regarding punitive damages, the court upheld the award of $2,000 based on a "willful and intentional violation of plaintiff's constitutional rights."[515] The defendant's intentional and considered disregard of the plaintiff's rights demonstrated the malicious intent. It is proper to consider the deterrent function of an award of punitive damages in relation to other, future executive officials, even though it is unlikely that the named defendant would again be in a position to perpetuate such unlawful conduct.

C. Attorney's Fees

An important factor in deciding whether to seek judicial enforcement of civil rights is the cost of litigation. The most significant aspect of this is, of course, the cost of counsel. In order to alleviate this problem, Congress has included in several civil rights acts a provision for awarding attorney's fees to the prevailing party.[516] Congress also added to section 1988 the Civil Rights Attorney's Fees Awards Act of 1976 to provide for attorney's fees to the prevailing party in several types of civil rights actions,[517] including cases brought under section 1983.[518]

A common question under section 1988 is whether the plaintiff is the "prevailing party." More specifically, there is often a question as to whether a plaintiff who was successful on less than all of the issues or

515. *Id.* at 520.

516. *E.g.*, 42 U.S.C. § 1973*l*(e) (1976) (Voting Rights Act); 42 U.S.C. § 2000a-3(b) (1976) (Title II of Civil Rights Act of 1967); 42 U.S.C. § 2000e-5(k) (1976) (Title VIII of Civil Rights Act of 1964); 20 U.S.C. § 3205 (Supp. III 1979) (Emergency School Aid Act).

517. 42 U.S.C. § 1988 (1976) (amended 1980). Section 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

518. While § 1988 does not provide for the appointment of counsel, some civil rights statutes do. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (1976). In Jones v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980), the Seventh Circuit for the first time enunciated some standards for the appointment of counsel under Title VII. It adopted the approach of the Fifth Circuit which articulates three factors to be weighed by the district court: "[T]he merits of the plaintiff's claim, the plaintiff's diligence in attempting to obtain a lawyer, and the plaintiff's financial ability to retain counsel." *Id.* at 577. The court also emphasized that the appointment of counsel is a matter for the district court's discretion, considering these guidelines, and further indicated that the district court may employ whatever procedure it finds most useful in making an informed decision. *Id.* at 578. Another case, Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981), identified several factors "highly relevant" to a request for appointment of counsel under 28 U.S.C. § 1915 (1976 & Supp. III 1979). The initial inquiry concerns the merits of the indigent's claim. If it is "colorable," then the court should consider the nature of the factual issues raised, the likelihood of conflicting evidence, the capability of the indigent litigant to present the case and the complexity of the legal issues raised. 650 F.2d at 887-89.

claims raised should be considered the prevailing party. An earlier case made it clear that section 1988 "does not require success on every issue, but [requires] a determination that the plaintiff below 'prevailed in a practical sense.' "[519] Several cases this term raised this issue. In *Murphy v. Kolovitz*,[520] the plaintiff, a twelve-year-old boy, brought an action claiming an unlawful or false arrest and the unjustifiable use of force in the arrest. He did not sufficiently prove false arrest; however, he did prove an unjustifiable physical abuse and recovered $2,000 in compensatory damages. Because the essential issue was the "unwarranted conduct of a police officer toward a twelve year old boy[,]"[521] the outcome in the case was not a "draw."[522] By establishing improper police conduct, the plaintiff prevailed in a practical sense.

Two other cases seem to be in conflict on this point. In *Sherkow v. Wisconsin*,[523] the plaintiff prevailed in part in an action under Title VII claiming sex discrimination. The defendant contended that since the plaintiff had not prevailed as to her entire claim, the recovery of attorney's fees should be reduced accordingly. This argument was rejected on the basis of the rationale of the Sixth Circuit in *Northcross v. Board of Education*[524] under which the test for section 1988 recovery seems to be whether the party prevailed "on the case as a whole."[525] If so, then the district court should allow compensation for hours expended on unsuccessful research unless the positions asserted were frivolous. Any other rule would "discourage innovative and vigorous lawyering in a changing area of the law."[526] The mandate to use the "broadest and most flexible remedies available" to enforce civil rights laws is best served by "encouraging attorneys to take the most advantageous position on their clients' behalf that is possible in good faith."[527]

Subsequently, in *Busche v. Burkee*,[528] another panel completely ignored *Sherkow* in rejecting "the rule announced in *Northcross* [even though it] may have considerable merit."[529] This panel found *North-*

519. Murphy v. Kolovitz, 635 F.2d 662, 663 (7th Cir. 1981) (quoting Dawson v. Pastrick, 600 F.2d 70, 78 (7th Cir. 1979)).

520. 635 F.2d 662 (7th Cir. 1981).

521. *Id.* at 663.

522. *See* Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 187 (7th Cir. 1979) (each party prevailed on one issue; no fees awarded).

523. 630 F.2d 498 (7th Cir. 1980). *See also* notes 347-63 *supra* and accompanying text.

524. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

525. 611 F.2d at 636.

526. *Id.*

527. *Id.*

528. 649 F.2d 509 (7th Cir.), *cert. denied*, 102 S. Ct. 396 (1981).

529. 649 F.2d at 522.

cross at odds with the formulation adopted in *Muscare v. Quinn*[530] which held that "attorney's fees should be awarded under § 1988 only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed."[531] There was no question that Busche was the prevailing party; however, it was not clear from the record whether fees had been awarded only for services reasonably related to the recovery of damages. Busche had not succeeded on all issues nor against all defendants.

The tests in *Northcross* and *Muscare* may not be all that far apart. In *Muscare*, the plaintiff asserted a first amendment challenge to the constitutionality of the Chicago Fire Department's grooming regulation restricting facial hair on firefighters. He also challenged, on due process grounds, the procedures used in disciplining him for violating the regulation. The constitutionality of the regulation was upheld, but the Seventh Circuit found that the procedures violated due process.[532] The claims were clearly distinguishable and the court, later addressing the attorney's fee issue, found that the procedural issue, "though significant, was not the main part of this case."[533] Even if *Muscare* is limited to situations where the successful and unsuccessful claims are clearly distinguishable and separate, the test in *Northcross* better serves the purposes of section 1988.[534]

A limited reading of *Muscare* may find support in *Entertainment Concepts, Inc. III v. Maciejewski*[535] where the court referred to *Muscare* in holding the plaintiff was the prevailing party because he "essentially succeeded in obtaining the relief he sought in his claims on the merits, even though he did not obtain damages or a declaratory judgment."[536] The plaintiff was successful in the constitutional challenges to a zoning ordinance and obtained an injunction prohibiting its en-

530. 614 F.2d 577 (7th Cir. 1980).

531. 649 F.2d at 522 (citing Muscare v. Quinn, 614 F.2d at 580-81).

532. 614 F.2d at 580.

533. *Id.*

534. There is not a uniform approach to this issue among the circuits. For example, the Fifth Circuit excludes time spent on unsuccessful claims which clearly lack merit; however, lack of success is not a basis for automatic exclusion because the relationship of the claims and contribution to the success must be considered. *See* Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir. 1981). The Eighth Circuit relied on the legislative history of § 1988 in holding a plaintiff entitled to fees for all time "reasonably expended on a matter." Brown v. Bathke, 588 F.2d 634, 637 (8th Cir. 1978). *See also* Sethy v. Alameda County Water Dist., 602 F.2d 894, 897-98 (9th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978); Hughes v. Repko, 578 F.2d 483, 486-87 (3d Cir. 1978).

535. 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also* notes 13-26 *supra* and accompanying text.

536. 631 F.2d at 507.

forcement. Thus it was only in parts of the requested relief that the plaintiff was unsuccessful.[537] The case was remanded for a determination of an appropriate award of fees, presumably for all the time expended by the plaintiff's counsel.[538]

Two other cases addressing the meaning of "prevailing party" are worth mentioning. In *Skoda v. Fontani*,[539] the Seventh Circuit held that the lower court was wrong in determining that the plaintiffs had not prevailed because the jury returned a verdict of only one dollar.[540] Even though it might be considered a "small victory," the plaintiffs did win. The plaintiffs in *Bond v. Stanton*[541] were found entitled to fees for postjudgment efforts in securing implementation of the judgment, for time spent defending the judgment on the merits on appeal and for time spent in litigating, both in the district court and on the appellate level, their entitlement to fees.[542] Absent an award for time spent litigating the fee issue, the original fee award would be diluted and the purpose of the Act would be frustrated.[543]

Another common concern in awarding attorney's fees relates to the identification of factors to be considered in arriving at the amount of the award. *Maciejewski* reaffirmed the adoption of the Fifth Circuit's standards[544] established in *Johnson v. Georgia Highway Express, Inc.*[545] These are practically identical to Disciplinary Rule 2-106 of the

537. In this case the court also rejected the defendants' argument that lack of bad faith was a special circumstance justifying denial of fees and their argument that inability to pay was a special circumstance. *Id.*

538. *Id.* at 508.

539. 646 F.2d 1193 (7th Cir. 1981).

540. *Id.* at 1194.

541. 630 F.2d 1231 (7th Cir. 1980).

542. *Id.* at 1233.

543. *Id.* at 1235.

544. 631 F.2d at 508.

545. 488 F.2d 714 (5th Cir. 1974). The factors set out in *Johnson* and adopted by the Seventh Circuit both in *Maciejewski* and in Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd in part*, 446 U.S. 754 (1980), are as follows:

(1) The time and labor required.
(2) The novelty and difficulty of the questions.
(3) The skill requisite to perform the legal services properly.
(4) The preclusion of other employment by the attorney due to acceptance of a case.
(5) The customary fee.
(6) Whether the fee is fixed or contingent.
(7) Time limitations imposed by the client or the circumstances.
(8) The amount involved and the results obtained.
(9) The experience, reputation and ability of the attorneys.
(10) The "undesirability" of the case.
(11) The nature and length of the professional relationship with the client.
(12) Awards in similar cases.

488 F.2d at 717-19.

American Bar Association Code of Professional Responsibility.[546] Later, in *Coop v. City of South Bend*,[547] the court referred to these standards as guidelines and indicated that it is not required that each of them be "considered and passed on specifically" since the award is to be "based on the totality of the case in light of the purpose of the act."[548] It was also suggested that in certain cases other factors might be considered;[549] however, these factors were not identified.

It is apparent in *Coop* that the court was concerned with the amount of the fee award in relation to the amount of recovery.[550] In a case decided a few weeks earlier, *Mary and Crystal v. Ramsden*,[551] the court explicitly held that it was appropriate for the trial court to reduce the hourly rates by forty percent "to bring the total compensation allowed into more reasonable relationship with the monetary recovery in the case."[552] This is somewhat disturbing. Presumably such a reduction, if ever appropriate, would be limited to cases seeking damages only. But *Mary and Crystal* was not such a case; it was a class action for injunctive relief relating to discipline at a juvenile correctional institution. If the courts are free to adjust the fee award to reflect the monetary relief, then a case could have broad impact based on equitable relief but result in a small fee because of a small damage award. This would not only discourage requests for damages but would generally discourage civil rights litigation.[553]

Once it is determined that a plaintiff has prevailed, then "fees should ordinarily be granted 'as a matter of course' absent circumstances which would render them unjust."[554] The special circum-

546. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106.

547. 635 F.2d 652 (7th Cir. 1980).

548. *Id.* at 655.

549. *Id.*

550. *Id.* In *Coop*, the trial court awarded fees of $6,000 against the three defendants who had been found liable for damages in the amount of $510. The other five defendants were either dismissed or successful on a motion for directed verdict. The award in fees appeared to the Seventh Circuit to be somewhat disproportionate to the amount of the recovery; it recognized, however, that "it would not be inconsistent with the record for the court to have concluded that the judgment would have an effect beyond the confines of the case." *Id.* at 654.

551. 635 F.2d 590 (7th Cir. 1980).

552. *Id.* at 601. The court did, however, reject the lower court's 40% reduction based on the fact that the plaintiffs were represented by an entity financed by government and private contributions. *Id.* at 601-02.

553. *Compare* Harkless v. Sweeny Ind. School Dist., 608 F.2d 594, 598 (5th Cir. 1979) (rejects premise that fees should be limited to amount of pecuniary recovery), *with* Furtado v. Bishop, 604 F.2d 80, 98 (1st Cir. 1979) (lower court erred in cutting fee request in half to make award consistent with contingent fee arrangement based on a percentage of the recovery), *cert. denied*, 444 U.S. 1035 (1980).

554. Murphy v. Kolovitz, 635 F.2d 662, 663 (7th Cir. 1981) (quoting Davis v. Murphy, 587 F.2d 362, 364 (7th Cir. 1978)). Note that the test is clearly different when a defendant prevails.

stances justifying the denial of fees to a prevailing plaintiff must be identified by the trial court.[555] Even though the Act makes the award of fees discretionary, an appellate court "cannot perform its function of delimiting the scope of discretion where there is no reason given for the decision below."[556] In *Murphy v. Kolovitz*,[557] the Seventh Circuit adopted the rule announced by the First Circuit in *Sargeant v. Sharp*.[558] Although adopting the *Sargeant* rule, the court indicated it did not intend a rigid application of the rule to require that the special circumstances "always be neatly packaged and labeled on the record," as long as the circumstances are "otherwise clearly and unarguably recognizable in the record as developed by the trial judge."[559]

Finally, two cases last term addressed the important question of the timing of an application for an attorney's fee award. In *Bond v. Stanton*,[560] the court expressly rejected the argument that a request for fees, if the matter is not dealt with in the judgment, must be filed within the ten-day period allowed for motions to alter or amend judgment under rule 59(e) of the Federal Rules of Civil Procedure.[561] The plaintiffs filed a motion for additional fees in January 1979 which, in part, sought fees for time spent implementing a summary judgment entered by the district court in 1974. The Seventh Circuit accepted the position of the Fifth Circuit on this issue: "[A] motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule

See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). The standard there is whether "a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* A fee award to two prevailing defendants was upheld in Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980), on the grounds that it was unreasonable for the plaintiffs to join the two defendants with respect to the claim for money damages and "as the case progressed it was unreasonable for the plaintiffs to refrain from voluntarily dismissing the action against them as to monetary relief." *Id.* at 603.

555. Murphy v. Kolovitz, 635 F.2d 662, 664 (7th Cir. 1981).

556. *Id.*

557. 635 F.2d 662 (7th Cir. 1981).

558. 579 F.2d 645 (1st Cir. 1978). The *Sargeant* court held:

> [T]he summary disposition of the threshold question of entitlement in an informal unrecorded settlement conference followed by issuance of an order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

Id. at 647 (citations omitted).

559. 635 F.2d at 664.

560. 630 F.2d 1231 (7th Cir. 1980).

561. *Id.* at 1234. *See* FED. R. CIV. P. 59(e).

59(e)."[562]

There was a wide range of views among the circuits on this issue.[563] The conflicts have now been resolved by the recent Supreme Court decision in *White v. New Hampshire Department of Employment Security*.[564] In reversing the First Circuit's holding that requests for fees must be filed within the ten days allowed by rule 59(e), the Court stated that "a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply."[565] The Court went on to point out that the fee determination will "require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has 'prevailed.' "[566]

In a somewhat advisory opinion in *Terket v. Lund*,[567] the court recognized the problem resulting from the consideration of a request for fees after final judgment. It indicated that the district courts should retain jurisdiction, even after a notice of appeal on the merits, to consider the fee issue.[568] However, the district courts were encouraged to consider the fee issue as expeditiously as possible to enhance the chances of consolidating the fee appeal with the appeal on the merits.[569] This, too, is consistent with *White*.[570]

With the exception of the court's approval of a substantial reduction of the fee award to bring it in line with the damage award and the confusion over the test to be applied when a plaintiff prevails in part, the law in this circuit on attorney's fees in civil rights litigation is quite encouraging. These recent developments should have the effect of promoting Congress' intent in passing the 1976 act—to encourage attorneys to bring civil rights litigation.

562. Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980).

563. *See* Obin v. District No. 9, Int'l Ass'n of Mach. & Aerospace Workers, 651 F.2d 574, 578-83 (8th Cir. 1981); Bacon v. Toia, 648 F.2d 801, 809-10 (2d Cir.), *prob. juris. noted*, 102 S. Ct. 969 (1981); Johnson v. Snyder, 639 F.2d 316, 317 (6th Cir. 1981); Gurule v. Wilson, 635 F.2d 782, 786-88 (10th Cir. 1981), *opinion clarified on petition for rehearing*, 649 F.2d 754 (10th Cir. 1981); Jones v. Dealers Tractor & Equip. Co., 634 F.2d 180, 181-82 (5th Cir. 1981); Gary v. Spires, 634 F.2d 772, 773 (4th Cir. 1980); Van Ooteghem v. Gray, 628 F.2d 488, 497 (5th Cir. 1980), *cert. dismissed*, 451 U.S. 935 (1981); Williams v. Alioto, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980).

564. 102 S. Ct. 1162 (1982).

565. *Id.* at 1166.

566. *Id.*

567. 623 F.2d 29 (7th Cir. 1980).

568. *Id.* at 33-34.

569. *Id.* at 34.

570. 102 S. Ct. at 1168 ("[T]he district courts generally can avoid piecemeal appeals by promptly hearing and deciding claims to attorney's fees.").

VII. CONCLUSION

As noted at the outset, this term did not significantly advance or facilitate civil rights litigation in the Seventh Circuit. There were, however, a few novel issues decided—whether an applicant expressing Nazi beliefs and sympathies can be excluded from the ROTC[571] and whether CETA workers can be allocated to a Catholic archdiocese to perform functions in elementary and secondary parochial schools[572]—and several cases dealing with fees,[573] which are certainly of interest to attorneys. In general, the court did not venture too far from fairly well-established principles in deciding the cases reviewed here.

571. *See* notes 83-94 *supra* and accompanying text.
572. *See* notes 140-79 *supra* and accompanying text.
573. *See* notes 516-70 *supra* and accompanying text.